Professor Anthony Kronman,
Sterling Professor of Law Yale Law School,
P.O. Box 208215,
New Haven, CT 06520, anthony.kronman@yale.edu,
(203) 432-4934
(Professor for Constitutional Law).

Richard Schultz,
Assistant Attorney General, Antitrust Bureau, Office of the Illinois Attorney General,
100 West Randolph Street,
Chicago, IL 60601, richardshultz18@comcast.net,
(630) 697-6375
(Supervisor during summer internship).

This applicant has certified that all data entered in this profile and any application documents are true and correct.

343 W. Schiller St.
Unit 508
Chicago, IL 60610
(847) 868-4707

June 12, 2023

Hon. Stephanie Dawkins Davis
Circuit Judge
United States Court of Appeals for the Sixth Circuit
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I am a rising third-year student at Yale Law School and wish to apply for a clerkship in your chambers for the 2024-25 term or any term thereafter. I have family in Michigan, and I have spent a significant amount of time in the state, so I would be honored to return to serve as your clerk on the Sixth Circuit.

I hope to pursue a career in appellate law, and clerking for the Sixth Circuit would offer an unparalleled learning opportunity. I have had the opportunity on two occasions to help prepare Professor Eric Brunstad, Jr. for his oral arguments before the Second Circuit and the United States Supreme Court. I have also worked on appellate briefs and motions in the Yale Housing Clinic and at Sidley Austin LLP.

I have enclosed my resume, a list of references, two writing samples, my law school transcript, and my undergraduate transcript from Dartmouth, where I graduated as co-valedictorian. You will receive letters of recommendation on my behalf from Professors Christine Jolls, Fiona Scott Morton, and Anthony Kronman.

Thank you for your consideration. I would welcome the opportunity to interview with you to discuss my interest. I look forward to hearing from you.

Sincerely,

Brandon Nye

Brandon Nye

Enclosures

BRANDON N. NYE

brandon.nye@yale.edu • (847) 868-4707
343 W. Schiller St., Unit 508, Chicago, IL 60610

EDUCATION

YALE LAW SCHOOL, New Haven, CT
J.D. expected, June 2024

Involvement: ***Yale Law & Policy Review*, Executive Articles Editor**
Teaching Assistant for Advanced Legal Writing, Prof. Rob Harrison
Morris Tyler Moot Court of Appeals Competition
Teaching Assistant for Competition Economics & Policy, Prof. Fiona Scott Morton
YLS Election Law Society, Co-Chair

Research: Research Assistant for Prof. Christine Jolls in Administrative Law and Employment Law
Research Assistant for Former White House Counsel Bob Bauer in Election Law
Thurman Arnold Project / Research Assistant for Prof. Fiona Scott Morton in Antitrust Law

DARTMOUTH COLLEGE, Hanover, NH
B.A., *summa cum laude*, Major in Economics with Honors, Minor in Public Policy, June 2020

GPA: **4.00 / 4.00**
Honors: **Co-Valedictorian**, Phi Beta Kappa, Economics Outstanding Achievement Award
Study Abroad: University of Oxford, Keble College, Oxford, England, Spring 2019
Involvement: *Dartmouth Law Journal*, Associate Editor
Resident Advisor, Dartmouth Office of Residential Life
Teaching Assistant, Dartmouth Department of Economics
Research: Policy Research Shop, Nelson A. Rockefeller Center, Student Researcher
Research Assistant for Prof. Ellen Meara in Health Economics

PROFESSIONAL EXPERIENCE

SIDLEY AUSTIN LLP, Chicago, IL — Summer 2023
Summer Associate. Drafted petition for leave to appeal a question of standing under the Fair and Accurate Credit Transactions Act to the Illinois Supreme Court. Conducted legal research and drafted memoranda on personal jurisdiction in a conspiracy fraud case; on unjust enrichment claims in a breach of contract case.

OFFICE OF THE ILLINOIS ATTORNEY GENERAL, ANTITRUST BUREAU, Chicago, IL — Summer 2022
Law Clerk. Drafted a motion to intervene on behalf of Illinois purchasers in an exclusive dealing settlement. Researched and analyzed defenses to a collusive wage-fixing complaint. Analyzed depositions and expert reports in a federal Big Tech trial. Conducted interviews to investigate right-to-repair and refusal-to-deal violations.

HOUSING / COMMUNITY & ECONOMIC DEVELOPMENT CLINIC, Yale Law School — 2022-2023
Law Student Intern. Prepared appellate brief for housing case before the Connecticut Supreme Court. Researched the legal requirements across states for forming and financing worker cooperatives. Drafted operating agreements for two local worker cooperatives. Drafted a Memorandum of Understanding between two nonprofits initiating a joint venture.

BRIDGEWATER ASSOCIATES, LP, Westport, CT — Summer 2019, 2020-2021
Investment Associate. Managed the firm's central bank policy tracking system and reported major monetary policy announcements during COVID-19 to the Chief Investment Officers. Created systems that track financial market movements and automatically adjust investment signals. Analyzed the causes of short- and long-term changes in the price of currencies, stock indexes, and bonds and presented findings to senior associates.

WORLD RESOURCES INSTITUTE, Washington D.C. — Summer 2017
Intern, First-Year Fellow. Researched the environmental impact and profitability of reforestation companies. Conducted interviews to assess the scalability, market, capital needs, and operational structure of reforestation companies. Developed a communication strategy for the release of a report targeted to investors. Reviewed literature on water pricing in China.

SKILLS AND INTERESTS

Proficient in Excel, R, and Stata. Beginner Greek. Enjoy crosswords, basketball, and creative writing.

Reference List

Brandon Nye
343 W. Schiller Street, Unit 508, Chicago, IL 60610
(847) 868-4707 • brandon.nye@yale.edu

Recommendation Writers

Professor Christine Jolls
Gordon Bradford Tweedy Professor of Law and Organization
Yale Law School
P.O. Box 208215
New Haven, CT 06520
christine.jolls@yale.edu
(203) 432-1958
Supervisor of research assistant position; Professor for Labor and Employment Law; Professor for Behavioral Law and Economics

Professor Fiona Scott Morton
Theodore Nierenberg Professor of Economics
Yale School of Management
P.O. Box 208200
New Haven, CT 06520
fiona.scottmorton@yale.edu
(203) 432-5569
Supervisor of research assistant position; Supervisor of teaching assistant position; Professor for Competition Economics and Policy

Professor Anthony Kronman
Sterling Professor of Law
Yale Law School
P.O. Box 208215
New Haven, CT 06520
anthony.kronman@yale.edu
(203) 432-4934
Professor for Constitutional Law

Additional References

Richard Schultz
Assistant Attorney General, Antitrust Bureau
Office of the Illinois Attorney General
100 West Randolph Street
Chicago, IL 60601
richardshultz18@comcast.net
(630) 697-6375
Supervisor during summer internship

YALE LAW SCHOOL

Office of the Registrar

TRANSCRIPT RECORD

YALE UNIVERSITY

Date Issued: 03

Record of: Brandon N Nye
Issued To: Brandon Nye
Parchment Document ID: TWB2BSTL

Page: 1

Date Entered: Fall 2021

Candidate for : Juris Doctor MAY-2024

SUBJ	NO.	COURSE TITLE	UNITS	GRD	INSTRUCTOR
Fall 2021					
LAW	10001	Constitutional Law I:Group 5	4.00	CR	A. Kronman
LAW	11001	Contracts I: Section A	4.00	CR	S. Carter
LAW	12001	Procedure I: Section C	4.00	CR	N. Marder
LAW	14001	Criminal Law & Admin I: Sect B	4.00	CR	D. Kahan
		Term Units 16.00	Cum Units 16.00		
Spring 2022					
LAW	21136	Employment and Labor Law	3.00	H	C. Jolls
		Substantial Paper			
LAW	21154	Competition Economics & Policy	3.00	H	F. Scott Morton
LAW	21610	Torts and Regulation	4.00	H	I. Ayres
LAW	30103	Community&Economic Development	2.00	H	A. Lemar, C. Muckenfuss, A. Cowing
LAW	30131	Community&EconDev: Fieldwork	2.00	H	A. Lemar, C. Muckenfuss, A. Cowing
		Term Units 14.00	Cum Units 30.00		
Fall 2022					
LAW	20032	Advanced Legal Writing	2.00	H	R. Harrison
LAW	20219	Business Organizations	4.00	P	J. Macey
LAW	20317	Secured Transactions	3.00	P	G. Brunstad
LAW	20450	First Amendment	4.00	P	R. Post
LAW	30132	Advanced CED: Fieldwork	2.00	H	A. Lemar, C. Muckenfuss, A. Cowing
		Term Units 15.00	Cum Units 45.00		
Spring 2023					
LAW	21277	Evidence	4.00	H	S. Carter
LAW	21601	Administrative Law	4.00	P	N. Parrillo
LAW	21649	Topics:BehavioralLaw&Economics	2.00	H	C. Jolls
LAW	21718	Aggregate Litigation	2.00	H	E. Cabraser
LAW	50100	RdgGrp: Election Law	1.00	CR	H. Gerken
		Term Units 13.00	Cum Units 58.00		

********** END OF TRANSCRIPT **********

LEG. SCHOL. YALENSIS NOVIPORT. ANNO DOM. MDCCCXXXV CONDIT.

Official transcript only if registrar's signature, embossed university seal and date are affirmed

YALE LAW SCHOOL
P.O. Box 208215
New Haven, CT 06520

EXPLANATION OF GRADING SYSTEM

Beginning September 2015 to date

HONORS	Performance in the course demonstrates superior mastery of the subject.
PASS	Successful performance in the course.
LOW **P**ASS	Performance in the course is below the level that on average is required for the award of a degree.
CREDIT	The course has been completed satisfactorily without further specification of level of performance. All first-term required courses are offered only on a credit-fail basis. Certain advanced courses are offered only on a credit-fail basis.
FAILURE	No credit is given for the course.
CRG	Credit for work completed at another school as part of an approved joint-degree program; counts toward the graded unit requirement.
RC	Requirement completed; indicates J.D. participation in Moot Court or Barrister's Union.
T	Ungraded transfer credit for work done at another law school.
TG	Transfer credit for work completed at another law school; counts toward graded unit requirement.
EXT	In-progress work for which an extension has been approved.
INC	Late work for which no extension has been approved.
NCR	No credit given because of late withdrawal from course or other reason noted in term comments.

Our current grading system does not allow the computation of grade point averages. Individual class rank is not computed. There is no required curve for grades in Yale Law School classes.

Classes matriculating September 1968 through September 1986 must have successfully completed 81 semester hours of credit for the J.D. (Juris Doctor) degree. Classes matriculating September 1987 through September 2004 must have successfully completed 82 credits for the J.D. degree. Classes matriculating September 2005 to date must have successfully completed 83 credits for the J.D. degree. A student must have completed 24 semester hours for the LL.M. (Master of Laws) degree and 27 semester hours for the M.S.L. (Master of Studies in Law) degree. The J.S.D. (Doctor of the Science of Law) degree is awarded upon approval of a thesis that is a substantial contribution to legal scholarship.

For Classes Matriculating 1843 through September 1950

80 through 100 = Excellent
73 through 79 = Good
65 through 72 = Satisfactory
55 through 64 = Lowest passing grade
0 through 54 = Failure

To graduate, a student must have attained a weighted grade of at least 65.

For Classes Matriculating September 1951 through September 1955

E = Excellent
G = Good
S = Satisfactory
F = Failure

To graduate, a student must have attained a weighted grade of at least Satisfactory.

For Classes Matriculating September 1956 through September 1958

A = Excellent
B = Superior
C = Satisfactory
D = Lowest passing grade
F = Failure

To graduate, a student must have attained a weighted grade of at least D.

From September 1959 through June 1968

A = Excellent
B+
B = Degrees of Superior
C+
C = Degrees of Satisfactory
C-
D = Lowest passing grade
F = Failure

To graduate a student must have attained a weighted grade of at least D.

From September 1968 through June 2015

H = Work done in this course is significantly superior to the average level of performance in the School.
P = Successful performance of the work in the course.
LP = Work done in the course is below the level of performance which on the average is required for the award of a degree.

CR = Grade which indicates that the course has been completed satisfactorily without further specification of level of performance. All first-term required courses are offered only on a credit-fail basis. Certain advanced courses offered only on a credit-fail basis.
F = No credit is given for the course.

RC = Requirement completed; indicates J.D. participation in Moot Court or Barrister's Union.
EXT = In-progress work for which an extension has been approved.
INC = Late work for which no extension has been approved.
NCR = No credit given for late withdrawal from course or for reasons noted in term comments.

CRG = Credit for work completed at another school as part of an approved joint-degree program; counts toward the graded unit requirement.
T = Ungraded transfer credit for work done at another law school.
TG = Transfer credit for work completed at another law school; counts toward graded unit requirement.
*Provisional grade.

June 27, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I am writing to you on behalf of Brandon Nye, a rising third-year student at the Yale Law School. Brandon will graduate in the spring of 2024. He has applied for a clerkship in your chambers. Brandon has my strong support.

I came to know Brandon in the fall of 2021 when he was a student in my class in constitutional law. Constitutional law is one of four courses that first-term students at Yale are all required to take. My class was what we call a “small group”—a seminar-sized class of sixteen. Each first-term student takes one of his or her required classes in a small-group format. The idea is to allow for more conversational interaction and to give students the opportunity to develop a closer relation with one of their professors. I was fortunate to have had Brandon in my class.

Brandon was a strong participant in our class discussions. He was invariably well-prepared, spoke often, and always contributed in a thoughtful way to the conversation around the table. It was obvious from the first day that Brandon had an infectious curiosity about the law and felt at home in his newly-chosen field. More than many in the class, he grasped the subtleties of the cases we were reading (including many very difficult ones) and appreciated the need to construe the abstractions of the law in a world of complex and constantly shifting facts. When Brandon disagreed with a classmate, he always did so in a collegial manner, looking for the best in the position he rejected and going out of his way to explain his own. All in all, Brandon was an exemplary class participant. He added to the positive chemistry of the class.

Over the course of the semester, the students in my small group completed a number of short writing assignments. The term ended with a more challenging one. The students were divided into pairs and each pair assigned one side or the other in a case then-pending before the Supreme Court (Makin v. Carson, a complicated case, since decided, involving questions pertaining to both the Establishment and Free Exercise clauses). The portion of his brief for which Brandon was responsible, was exemplary in its clarity and force. It was as good as most of the briefs I have read written by senior lawyers at distinguished firms. His oral argument was just as impressive—calm, self-possessed without being arrogant, fully responsive to questions from a pretty aggressive bench (myself and my two third-year teaching assistants).

In my many conversations with Brandon outside of class, I found him to be thoughtful, gracious, friendly and even-tempered. I am confident that Brandon possesses both the intellectual and temperamental qualities required to perform at a very high level in the most demanding situations. The judge who hires Brandon will be as happy to have done so, as I am to have had Brandon in my class his first semester in law school.

Sincerely,

Anthony Kronman

Anthony Kronman - anthony.kronman@yale.edu - 203-432-4934

Yale SCHOOL OF MANAGEMENT

FIONA M. SCOTT MORTON
Theodore Nierenberg Professor of Economics

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courier
165 Whitney Avenue
New Haven CT 06511

1 June 2023

Dear Judge,

I urge you to consider **Brandon Nye** for a clerkship position; he has my very strongest recommendation.

I have known Brandon well since he took my Competition Economics last year. This class is open to MBA, Law, and Undergraduate students at Yale and attracts 10 or so law students every year. The course teaches students how to use economic concepts in enforcing the US antitrust laws. We cover topics such as the conditions required for a cartel to be self-enforcing, how to estimate substitution patterns and what they reveal about diversion after a merger, and the strategies behind exclusionary conduct such as predation or loyalty rebates.

Brandon majored in economics at Dartmouth. At most universities economics is a subject that deservedly has a reputation among the students for requiring a lot of work while awarding relatively low grades. This did not hold back Brandon, however, who earned an A in every single class he took at Dartmouth. His economics talent was evident in my class -- where he received the highest available grade. His final project in the class was an oral presentation and final paper on the Epic v Google case which is quite tricky both of those assignments were excellent.

But I particularly remember reading Brandon's final exam in Competition Economics. Not only did he receive a perfect score, but his exam displayed several other qualities. He answered with far more detail and completeness than was necessary for full credit, and he deployed the relevant economic analysis deftly. The aspect of his exam that I enjoyed the most – and this is unusual, because grading is generally unpleasant – was his intuition for fitting the economics into the law. In my experience this is a rare skill, and it is difficult to teach. Some students with an economics background can solve economic problems but do not see how to mesh them into the legal analysis. Many of my law students do not appreciate how to deploy the economics to support the

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legal points they want to make. But Brandon is able to integrate the two disciplines beautifully. I believe his effectiveness is driven by a solid and deep understanding of both the law and the economics that lets him avoid getting tangled in the weeds and instead focus on the places where integration is powerful. He is then able to convey that intuition clearly and easily in his writing. He is someone I would hire in a heartbeat to write about economic issues and the law.

Indeed, I immediately invited Brandon to be a teaching assistant for the next year of Advanced Competition Economics which gave me a larger window into his work ethic and interpersonal skills. He has been outstanding. The TA role tests for other skills such as responsibility, organization, the ability to help fellow students, and an appreciation of professional responsibility around issues like disability accommodations and grading. Brandon has all of these qualities in abundance.

Being a TA requires a thorough intellectual understanding of the material, but also the ability to see when and why others do not understand, and the skill of articulating ideas so as to help those who are having this trouble. Brandon is also helpfully pro-active and takes appropriate independent responsibility as issues arise. For example, the class features a problem set that requires the students to estimate a merger simulation using the R programming language. I usually hire an economics graduate student to run the problem set as many students have trouble with it and need help. However, this year I did not have that person organized and, as a consequence, I was planning to drop the problem set from the class. Brandon said he would handle it, simply took over, updated the materials, and guided the students through the exercise. It was marvelous. And I learned that his technical skills are non-trivial.

Brandon is extremely competent, friendly, and a delightful colleague. He took pains to come early to the class dinner I held for the students, for example, because he was worried there was too much setup for me to do by myself. In my interactions with Brandon, he has stepped up in emergencies, finished every task quickly, produced excellent work, and been creative in thinking of solutions to problems that arose during the term. There are constantly students offering excuses for missed classes, problems with the organization of student groups, guest speakers that need to be hosted, and the like, all of which disrupt the flow of the week's work. I did not worry that any aspect of class would fall through the cracks or that any work would not be of professional quality while Brandon was on the team.

I have also worked with Brandon through the Thurman Arnold Project. This is an organization I founded in 2019 that provides antitrust programming to students. In particular, I try to find policy settings where students can write about antitrust in a way that is intellectually rigorous but

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also applicable to a current enforcement problem. With a little guidance from me Brandon wrote a blog for the University of Chicago's ProMarket site about the Meta-Within merger. It is a sophisticated antitrust analysis comparing the complaint the FTC brought (horizontal merger) to a vertical merger complaint (advocated by Prof Steven Salop) to a monopolization theory of harm. Brandon explores how the publicly-available evidence supports such a theory, where the harm to competition could arise, and then the legal strategy an agency could use to protect competition. Brandon did all the work for the piece in the middle of the semester while he had his own coursework to finish and his TA responsibilities to carry out.

This academic year the Thurman Arnold Project organized a series of papers written by teams of students on the topic of "antitrust and market realities." Brandon and two other students produced a very nice paper analyzing acquisitions of data by platforms. The students wrote the paper outside of class time, another demonstration of commitment. Again, the paper shows Brandon's ability to integrate economics and law in a very productive way. Using the concept of network effects from economics, the authors characterize data transactions that could be exclusionary and distinguish them from more traditional settings that can be analyzed with old tools. This is a clean and correct point that has been underappreciated in antitrust enforcement to date. I took all the teams to Washington in May where they presented their work to leaders at both the DOJ and the FTC.

Brandon combines interest and training in law as well as economics, consulting experience, experience with antitrust enforcement from the Illinois Attorney General's office, and an understanding of – and interest in - the real world. I believe this interest in the real world is critical to Brandon's analytical ability. He can see why an economic problem has arisen and then reason creatively to fit that problem and its environment into an existing legal framework.

Brandon is personable, professional, and someone with whom it is a pleasure to work. I saw him working effectively and collegially with classmates in a variety of settings as well as with me. I have no doubt about his ability to work effectively in a team.

In short, I am absolutely confident that Brandon will make an outstanding law clerk. ***I give him my highest recommendation***. Please do not hesitate to contact me if I can be of further assistance.

Sincerely yours,

Yale SCHOOL OF MANAGEMENT

July 10, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I am writing to recommend Brandon Nye, an immensely impressive Yale Law School student who was co-valedictorian of the Dartmouth College Class of 2020, for a clerkship in your chambers. I recommend Brandon, who expects to pursue a career in public service as a federal government lawyer, to you with the greatest possible enthusiasm.

By way of background for this recommendation, I served as a law clerk myself both at the United States Court of Appeals for the District of Columbia Circuit and at the Supreme Court of the United States.

I know Brandon extremely well because he has been a truly fantastic research assistant for me as well as an outstanding student in two courses, Employment and Labor Law and a seminar. I met him in Employment and Labor Law during his first year of law school. In responding to cold-call questions, he showed both consistently dazzling preparation and great insight. His end-of-term paper was more of the same, easily earning a grade of H in the class; thus, I was thrilled to find him among the applicants for a summer research assistant position with me last summer, and I hired him immediately. He has been an absolutely invaluable research assistant over the past year (more on that in the next paragraph). His performance the seminar he took with me this year was as terrific as his performance in Employment and Labor Law was. He showed extaordinarily strong understanding of the course material in the seminar and offered trenchant analysis every week. His end-of-term paper was, as in Employment and Labor Law, smart, beautifully reasoned and executed, and extremely well-written.

Brandon is fantastic as a research assistant. He completes assigned memos both quickly and excellently. He works efficiently, sets priorities well, and is a great communicator. His most recent memo analyzed court of appeals case law on OSHA preemption and was superb.

On a personal level, Brandon is genuine, upbeat, flexible, and professional. My working relationship with him has been ideal.

For all of these reasons, I recommend Brandon to you with the greatest possible enthusiasm. I hope that you will not hesitate to contact me, or have anyone from your chambers contact me, at christine.jolls@yale.edu or 203-432-1958 if there is any additional information I might be able to provide in connection with your consideration of his application.

Sincerely,

Christine Jolls
Gordon Bradford Tweedy Professor
Yale Law School
christine.jolls@yale.edu
(203) 432-1958

WRITING SAMPLE 1

Brandon Nye
343 W. Schiller Street, Unit 508
Chicago, IL 60610
(847) 868-4707

The attached writing sample is a memorandum written for my Advanced Legal Writing class. The assignment was to write a "closed universe" memo that analyzes whether a transaction between two parties is governed by Article 2 of the Illinois Commercial Code. All the legal analysis and writing are my own work.

MEMORANDUM

TO: Senior Attorney
FROM: Brandon Nye
DATE: December 1, 2022
RE: Whether Article 2 of the Illinois Commercial Code Applies to the GVM-Babott Contract

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QUESTION PRESENTED

Our client, Grand Viking Mechanics, Inc. ("GVM"), entered into a contract to sell Babott Corp. ("Babott") diesel generator equipment. The contract also required GVM to test, deliver, and install the equipment and to train Babott personnel. The contract is governed by Illinois law, and Article 2 of the Illinois Commercial Code applies to "transactions in goods" as opposed to contracts for services. 810 Ill. Comp. Stat. 5/2-102 (2021). The question presented is whether Article 2 applies to the contract and therefore whether our client transacted in goods or in services when it supplied Babott with diesel generator equipment.

BRIEF ANSWER

Article 2 very likely applies to the contract between GVM and Babott. The diesel generator equipment meets Article 2's definition of a good because it was movable at the time GVM identified it as the contracted equipment. Even though GVM also provided services to Babott, the contract language strongly implies that the transaction was predominantly for the sale of the equipment. The contract obliges the parties to "sell" and "purchase" the equipment, designates the parties "Seller" and "Purchaser," passes title to the equipment from GVM to Babott, and includes a sales tax provision.

STATEMENT OF ASSUMED FACTS

Our client, GVM, is a corporation organized under the laws of Norway. GVM manufactures machinery and electronics. Babott is a Delaware corporation with offices in Barceloneta, Puerto Rico and Naperville, Illinois. Babott manufactures primarily chemicals. In July 2016, Babott solicited bids from manufacturers to furnish and deliver a single, slow speed diesel generator unit for its Barceloneta plant. GVM submitted a bid to supply Babott with a generator, a diesel engine, and auxiliary equipment (collectively, the "Equipment"). In April 2017, GVM and Babott entered into the Puerto Rico Cogeneration Agreement (the "Agreement") in which GVM promised to supply Babott with the Equipment.

The Agreement's preamble states that the Agreement would refer to Babott as the "Purchaser" and GVM as the "Seller." Section 2 of the Agreement, titled "Purchase and Sale," provides, "Seller shall design, fabricate, test, deliver to Purchaser's site, provide technical guidance and assistance for installation and start-up, and sell the Equipment to Purchaser, and Purchaser shall purchase the Equipment from Seller." Section 4 requires GVM to develop the design of the Equipment, section 5 requires GVM to "fabricate" the Equipment, and section 8 requires GVM to provide "all necessary technical information, guidance, training, and assistance." Section 8 makes Babott "responsible, at its expense, for unloading, unpacking and installing the Equipment in its Barceloneta, Puerto Rico facility." However, in October 2017, Babott and GVM entered into a "Contract Change Order" requiring GVM to install the Equipment.

Section 6, titled "Delivery" provides that "title to the Equipment shall pass to Purchaser upon delivery at Purchaser's facility in Barceloneta" and that "title to the Equipment and every component thereof shall be conveyed by Seller to Purchaser." Section 10 of the Agreement

establishes GVM's warranties. GVM warrants that the Equipment will be "free from defects in material, workmanship, and design" and warrants that "technical assistance shall be available" at Babott's facility during the warranty period. Section 13 covers taxes and provides that "any sales or use tax . . . levied or assessed by the United States or Puerto Rico shall be paid by Purchaser." Section 14 provides that the Agreement "shall be construed, interpreted and governed by the laws of the State of Illinois."

In June 2019, GVM shipped the Equipment to Babott's Barceloneta facility. During the fall of 2019, GVM installed the Equipment and provided training to Babott personnel. Installation was complete in December 2019. Between December 2019 and January 2021, Babott personnel discovered various "microseizures" in the engine, cracks in the generator rotor, and other defects. GVM repeatedly deployed test and repair teams to fix the problems with the Equipment at no cost to Babott. Babott is suing GVM for the incremental expenses Babott incurred by purchasing electricity from the Puerto Rico Electric Power Authority when the generator was shut down for repair.

APPLICABLE STATUTES

810 Ill. Comp. Stat. 5/2-102 (2021)

> Scope; . . . [T]his Article applies to transactions in goods . . . .

810 Ill. Comp. Stat. 5/2-105(1) (2021)

> "Goods" means all things, including specially manufactured goods, which are movable at the time of identification to the contract for sale . . . .

810 Ill. Comp. Stat. 5/2-106(1) (2021)

> In this Article unless the context otherwise requires "contract" and "agreement" are limited to those relating to the present or future sale of goods. "Contract for sale" includes both a present sale of goods and a contract to sell goods at a future time. A "sale" consists in the passing of title from the seller to

> the buyer for a price (Section 2-401). A "present sale" means a sale which is accomplished by the making of the contract.
>
> 810 Ill. Comp. Stat. 5/2-501(1) (2021)
>
> [I]dentification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement identification occurs
> (a) when the contract is made if it is for the sale of goods already existing and identified;
> (b) . . . when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers;
> . . . .

DISCUSSION

Under Illinois law, Article 2 applies to a contract only if the parties transacted in goods. When deciding whether parties transacted in goods, Illinois courts first determine whether the exchanged products meet Article 2's definition of a good. If the parties also contracted for services, courts then determine whether the contract covered predominantly goods or predominantly services.

I. Does the Equipment meet Article 2's definition of a good?

For Article 2 to govern the contract, the Equipment exchanged by GVM and Babott must meet Article 2's definition of a good. Article 2 defines goods as "all things, including specially manufactured goods, which are movable at the time of identification to the contract for sale." 810 Ill. Comp. Stat. 5/2-105(1) (2021). Identification means acknowledging "existing goods as goods to which the contract refers." 810 Ill. Comp. Stat. 5/2-501(1) (2021). When, as here, the transacted goods do not exist when the contract is made, the goods are identified when they "are shipped, marked or otherwise designated by the seller." *Id.* at 5/2-501(1)(b). Article 2's "coverage of 'goods' is not to be given a narrow construction but instead should be viewed as

being broad in scope" in order to "achiev[e] uniformity in commercial transactions." Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co., 532 F.2d 572, 580 (7th Cir. 1975).

Goods can be identifiable even before they are assembled or installed. *See* Meeker v. Hamilton Grain Elevator Co., 442 N.E.2d 921 (Ill. App. Ct. 1982). The Meeker court rejected the notion that grain bins are not identifiable "until they [are] erected and bolted." *Id.* at 923. Meeker built the grain bins using a set of "steel pieces that [had] been cut and shaped to specified dimensions and angles." *Id.* Because the grain bin pieces would resemble the contracted product once fitted together, the pieces are "identifiable even though not yet assembled." *Id.*

In this case, the Equipment did not exist when the contract was made, so it became identifiable when GVM shipped it. At this time, the Equipment was movable, given that it was transported from GVM's Norway facility to Puerto Rico. While the engine, generator, and auxiliary equipment had yet to be attached into a completed diesel generator at the time of delivery, they were still identifiable as the goods contracted in the Agreement. The Agreement does not require GVM to furnish a completed diesel generator. Rather, the Agreement only requires GVM to provide the separate components, each of which was identifiable when shipped. Even assuming the Agreement implied that GVM was to supply a finished diesel generator, those components would resemble the diesel generator once assembled. According to Meeker, the diesel generator was thus identifiable when the parts were shipped.

Thus, the Equipment was movable at the time of identification and therefore satisfies Article 2's definition of a good.

II. Did GVM and Babott exchange predominantly goods or services?

Next, the court will consider whether the Agreement was predominantly about selling the Equipment or predominantly about providing services. Contracts to supply equipment, facilities,

and other products often include the exchange of both goods and services. Under these circumstances, courts employ the "predominant character test" to determine whether Article 2 applies to the contract. By this test, a transaction that is "predominately one for the sale of goods with services incidentally involved" is a transaction in goods as opposed to a transaction "for the rendition of services with the sale of goods incidentally involved." Republic Steel v. Pa. Eng'g Corp., 785 F.2d 174, 181 (7th Cir. 1986). *See also* Boddie v. Litton Unit Handling Sys., 455 N.E.2d 142, 150 (Ill. App. Ct. 1983) (citing Meeker v. Hamilton Grain Elevator Co., 442 N.E.2d 921, 922 (Ill. App. Ct. 1982)). The predominant character test applies even when the agreement contains a "substantial" amount of incidental services. *See* Tivoli Enter. v. Brunswick Bowling & Billiards Corp., 646 N.E.2d 943, 948 (Ill. App. Ct. 1995) ("We do not dispute that the services performed by Brunswick in furtherance of the contract were substantial."); Republic Steel v. Pa. Eng'g Corp., 785 F.2d 174, 181 (7th Cir. 1986) ("We do not doubt that the design, engineering, and purchase-agency services rendered by PEC in furtherance of the Agreement were substantial. That alone, though, is not sufficient to determine the predominant character.").

Illinois courts will often classify a transaction as an exchange predominantly of goods or predominantly of services based on the "the text of the contract itself." Nitrin, Inc. v. Bethlehem Steel Corp., 342 N.E.2d 65, 78 (Ill. App. Ct. 1976). "The intent of the parties to a written contract must be determined solely from the language used when no ambiguity in its terms exists." *Id.* Courts look primarily to five factors in analyzing the contract language: 1) how the contract describes the parties' obligations; 2) whether the contract designates the parties as 'purchasers' and 'sellers'; 3) whether the contract states that title to certain property passes from one party to another; 4) what the warranty provisions cover; and 5) whether one party charges a sales tax. No one factor is dispositive, and courts usually rule based on the where the bulk of the

evidence lies. *See, e.g.*, Bob Neiner Farms, Inc. v. Hendrix, 490 N.E.2d 257, 259 (Ill. App. Ct. 1986) (ruling that the contract was predominantly for goods even though the "contract includes both aspects which would favor a finding that it was primarily for goods . . . and aspects which would favor a finding that it was primarily for services").

GVM provided Babott with both goods and services. GVM supplied the Equipment and employed labor to train Babott employees, install the Equipment, and test the generator. Thus, a court would analyze the Agreement according to the above five factors.

A. Contract's Description of the Parties' Obligations

Illinois courts look to how the contract describes the parties' obligations in order to discern the character of the agreement. Courts often deem the transaction to be predominantly about goods when the contract obligates the parties to purchase or sell specific goods and when the contract only requires services to further that sale. The Meeker court, for example, found it compelling that "[t]he contract says that the defendant 'agrees to purchase from the Seller, the following equipment.'" 442 N.E.2d at 922. While the plaintiff in Meeker assembled and installed the equipment and thus provided services, the language of the contract implied that the sale of the equipment was the primary purpose with the assembly services necessary to achieve the sale. *Id. See also* Republic Steel, 785 F.2d at 180 (ruling that selling furnaces was "the heart of the [a]greement" even though the agreement also included design, assembly, and training services because of the agreement's "specific and detailed reference . . . to the purchase of the furnaces"); Tivoli, 646 N.E.2d at 944, 948 (ruling that because the contract stated that the plaintiff was ordering "materials" and "equipment," the transaction was predominantly a sale of goods even though the plaintiff also received labor to assemble, install, and assess the goods).

A contract can, on the other hand, describe the parties' obligations so as to indicate that it is a service agreement with goods incidentally involved. Construction contracts often describe the primary obligation as "construction," "alteration," and "installation" and allow the contractor to procure materials in order to achieve that goal. *See, e.g.*, Boddie v. Litton Unit Handling Sys., 455 N.E.2d 142, 150 (Ill. App. Ct. 1983) (noting that the language of the general construction contract requires the party to construct, install, excavate, and modify). In Nitrin, the "agreement expressed a desire by plaintiff to have an ammonia plant 'designed, constructed and completed' by defendant, not a desire to purchase the facility from defendant." 342 N.E.2d at 78. The "defendant was to 'procure, expedite, receive, install and erect all equipment.' No mention is made of selling equipment." *Id.* "Such general construction contracts . . . have as their primary thrust the rendition of services rather than the sale of goods." Boddie, 455 N.E.2d at 150.

Like the contract in Meeker, the Agreement explicitly obliges the parties to "sell" and "purchase." Like the sale of goods in Tivoli and Republic Steel, the Agreement names the Equipment as the object of the sale. Section 2 of the Agreement is entitled "Purchase and Sale." This section provides that GVM, the "Seller," "shall design, fabricate, test, deliver to Purchaser's site . . . and sell the Equipment to Purchaser, and Purchaser shall purchase the Equipment from Seller." Unlike the contracts in Boddie and Nitrin, the contract does not mention construction.

One might argue that the term "fabricate" is synonymous with "construct" and therefore GVM was a construction contractor. However, in all of the sale-of-goods cases cited, the sellers had to furnish specially manufactured equipment for the purchasers. This fact did not change the courts' determination. Likewise, GVM constructed a specific piece of equipment to be sold; it did not enter into a general construction agreement as in Boddie and Nitrin.

Additionally, one could argue that GVM offered predominantly services when it installed the Equipment, trained Babott personnel, and tested the generator. However, the sellers in Meeker and Tivoli also installed the sold equipment. As with those cases, GVM's installation service was in furtherance of the main purpose of the transaction: to sell the Equipment to Babott. This is evidenced by Babott not asking GVM to install any other machinery besides the Equipment. Further, the training and testing services offered in Republic Steel and Tivoli, no matter how substantial, did not overcome the written, primary intent of the parties to sell a good, so this argument is similarly unpersuasive.

The Agreement's language around the parties' obligations strongly suggests that the transaction was predominantly about the sale of the Equipment and that the services provided were merely incidental.

B. Contract's Designation of the Parties

To determine a contract's predominant purpose, Illinois courts also consider how the contract labels the parties. When the contract labels the parties 'purchaser' and 'seller,' the court sees this as indicative of the parties' intent to sell goods. *See* Meeker, 442 N.E.2d at 923 ("Throughout the contract the parties are called 'seller' and 'purchaser.' . . . These terms signify that a sale of goods was predominant and services incidental."). Conversely, when the contract in Nitrin denominated the parties "'Owner' not buyer" and "'Contractor' not seller," the court viewed this language as evidence that the contract was for construction and engineering services. 342 N.E.2d at 78.

Like the Meeker contract, the Agreement's preamble clearly designates GVM as "Seller" and Babott as "Purchaser." Thus, the Agreement's designation of the parties supports the argument that the parties transacted predominantly to exchange goods.

C. Passing of Title

Whether or not a contract explicitly passes title to property from one party to another will indicate whether the corresponding transaction is predominantly about goods. *See generally* Nitrin, 342 N.E.2d 65. Section 2-106(1) of the Illinois Commercial Code defines a sale of goods as "the passing of title from the seller to the buyer for a price." 810 Ill. Comp. Stat. 5/2-106(1) (2021). In Nitrin, the contract stated that "title to all machinery and equipment and supplies for the work shall, as between Owner and Contractor, be in Owner." *Id.* at 78. Because the contractor never held title to the goods, the transaction was exclusively for construction services and not for the sale of equipment. Similarly, the subcontractor in J&R Elec. Div. v. Skoog Const. Co. successfully bid on a project, whose plans and specifications said that the equipment would be procured by the owner. 348 N.E.2d 474, 475 (Ill. App. Ct. 1976). The subcontractor never held title to the equipment. Thus, the court inferred no sale. *Id.* at 477.

Unlike in the contractor agreements in Nitrin and J&R Elec., the Agreement demonstrates that GVM initially held title to the Equipment and that the title passed to Babott upon delivery. Section 6 of the Agreement explicitly states that upon delivery, "[t]itle to the Equipment and every component thereof shall be conveyed by Seller to Purchaser." This language meets the statutory definition of a sale of goods and thus supports the argument that the transaction was predominantly a sale of goods and not a construction contract.

D. Contract's Warranty Provisions

An Illinois court has also analyzed a contract's warranty provisions to determine a transaction's predominant character. Tivoli, 646 N.E.2d at 948. Where the warranty covers defects in materials and workmanship, the "warranty runs to the goods . . . not the services

incidental thereto." *Id.* This warranty factored into the Tivoli court's determination that the transaction was predominantly about goods. Nearly identical to the Tivoli warranty, the Agreement's warranty in section 10 covers "defects in material, workmanship, and design." The court would likely consider this to be a warranty that "runs to the goods." However, the Agreement also contains a service warranty: GVM warrants that it will provide technical assistance to Babott during the warranty period. Thus, the Agreement's warranty provisions do not provide a clear indication of whether the transaction is predominantly about goods or predominantly about services.

E. Sales Tax

Courts will also consider it instructive when the parties to a contract include sales tax in the final transaction price because a sales tax indicates a sale of goods, not an exchange of services. *See* Tivoli, 646 N.E.2d at 948 ("[T]he contract specifies a total sales price of $74,655, which includes sales tax. Such tax is found in the sale of goods, but not services."); Meeker, 442 N.E.2d at 923 ("The plaintiff charged a sales tax on the total value of the contract. These terms signify that a sale of goods was predominant and services incidental.").

Unlike the contracts in Tivoli and Meeker, the Agreement does not include a sales tax in the final contract price. Instead, the Agreement provides that "[a]ny sales or use tax . . . levied or assessed by the United States or Puerto Rico shall be paid by Purchaser." GVM thus did not automatically charge Babott a sales tax and instead left the matter conditional on taxing authorities' decisions. One could thus argue that this contract term was merely precautionary. However, including this language does indicate that the parties expected to potentially pay sales taxes, which implies that the parties were knowingly transacting in goods. A court could go both

ways on this factor, but the parties likely indicated their intent to sell goods when they agreed to a sales tax provision.

CONCLUSION

Article 2 of the Illinois Commercial Code very likely applies to the contract between GVM and Babott because the parties very likely transacted in goods, not services, when GVM sold diesel generator equipment to Babott. First, the Equipment meets Article 2's definition of a good because it was movable and identifiable at the time GVM shipped it to Babott. Second, even though GVM also provided services to Babott, the contract language strongly implies that the transaction was predominantly for the sale of the Equipment. The Agreement obligates the parties to 'sell' and 'purchase' the Equipment, labels the parties 'Seller' and 'Purchaser,' passes title to the Equipment from GVM to Babott, and contemplates a sales tax. While the Agreement's warranty provisions cover both goods and services and thus are not persuasive one way or the other, the combination of the other four factors would very likely convince a court that the transaction was predominantly a sale of goods. Thus, Article 2 very likely governs the transaction.

WRITING SAMPLE 2

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The attached writing sample is an excerpt from a brief that I wrote for the Morris Tyler Moot Court of Appeals Competition at Yale Law School. I argued on behalf of the respondents in the pending Supreme Court case *303 Creative LLC v. Elenis*. The question presented is whether the Free Speech Clause prevents Colorado from enforcing its public accommodations law against a website design company that creates custom wedding websites. The legal research and writing are my own work and have not been revised by anyone else.

No. 21-476

In The
Morris Tyler Moot Court of Appeals at Yale

_____

303 CREATIVE LLC, ET AL.,

Petitioner,

v.

AUBREY ELENIS, ET AL.,

Respondent.

_____

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

_____

BRIEF FOR RESPONDENT

_____

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QUESTION PRESENTED

Whether the Free Speech Clause prevents Colorado from enforcing its public accommodations law against a website design company that denies same-sex couples the wedding website services it offers to opposite-sex couples.[1]

[1] Petitioners are 303 Creative LLC and Lorie Smith. Respondents are Aubrey Elenis, Charles Garcia, Ajay Menon, Miguel Rene Elias, Richard Lewis, Kendra Anderson, Sergio Cordova, Jessica Pocock, and Phil Weiser.

TABLE OF CONTENTS

QUESTION PRESENTED ..... **I**

TABLE OF CONTENTS ..... **II**

TABLE OF AUTHORITIES ..... **III**

OPINIONS BELOW **1**

STATEMENT OF JURISDICTION **1**

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED **1**

STATEMENT OF THE CASE **2**

SUMMARY OF ARGUMENT **3**

ARGUMENT **4**

I. THE ACCOMMODATIONS CLAUSE IS A PERMISSIBLE REGULATION OF DISCRIMINATORY COMMERCIAL CONDUCT THAT DOES NOT VIOLATE THE FREE SPEECH CLAUSE AS APPLIED TO PETITIONERS' INTENDED ACTIVITIES. 4

A. Petitioners' website design services are not Petitioners' expression, nor do the websites pertain to matters of public concern; therefore, they are not protected speech. *4*

1. Petitioners' website design services are not understood to be Petitioners' expression. *4*

2. The wedding websites that Petitioners intend to create are not matters of public concern. *8*

B. Even if Petitioners' website design services are protected speech, the Accommodations Clause is a content-neutral restriction on private speech, so the Court should apply intermediate scrutiny, not strict scrutiny. *12*

1. The Accommodations Clause is content neutral. *12*

2. The wedding websites that Petitioners intend to create are not matters of public concern. *16*

C. The Accommodations Clause is narrowly tailored to achieve a compelling government interest in ensuring equal access to publicly available goods and services, and therefore the statute should survive even strict scrutiny. *16*

1. Colorado has a compelling interest in ensuring equal access to public accommodations. *16*

2. The Accommodations Clause is necessary, narrowly tailored, and the least restrictive means of achieving Colorado's compelling interest. *18*

II. THE COMMUNICATIONS CLAUSE IS A PERMISSIBLE REGULATION OF UNLAWFUL COMMERCIAL ADVERTISING THAT DOES NOT VIOLATE THE FREE SPEECH CLAUSE AS APPLIED TO PETITIONERS' PROPOSED STATEMENT. 20

CONCLUSION **21**

APPENDIX **22**

TABLE OF AUTHORITIES

CASES

303 Creative LLC v. Elenis, 405 F. Supp. 3d 907 (D. Colo. 2019) ---- 1, 2
303 Creative LLC v. Elenis, 6 F.4th 1160 (10th Cir. 2021) ---- 1, 2
Bigelow v. Virginia, 421 U.S. 809 (1975) ---- 9
Brown v. Ent. Merchants Ass'n, 564 U.S. 786 (2011) ---- 16, 19
Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) ---- 8, 9, 10
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) ---- 9
Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) ---- 9
Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) ---- 17, 18
Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995) ---- *passim*
Hustler Mag., Inc. v. Falwell, 485 U.S. 46 (1988) ---- 8
Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) ---- 9
McCullen v. Coakley, 573 U.S. 464 (2014) ---- 12, 16
Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) ---- 8, 10
Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361 (2018) ---- 13, 16
New York Times Co. v. Sullivan, 376 U.S. 254 (1964) ---- 9
Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1 (1986) ---- 10, 17
Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels., 413 U.S. 376 (1973) ---- 20
PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) ---- 6, 7, 13, 19
Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781 (1988) ---- 10, 19
Roberts v. U.S. Jaycees, 468 U.S. 609 (1984) ---- 12, 17, 18, 19
Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47 (2006) ---- 5, 7, 13, 20
Snyder v. Phelps, 562 U.S. 443 (2011) ---- 8, 10, 16
Spence v. Washington, 418 U.S. 405 (1974) ---- 5
Texas v. Johnson, 491 U.S. 397 (1989) ---- 5, 12
Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994) ---- 5, 13
United States v. O'Brien, 391 U.S. 367 (1968) ---- 5
Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976) ---- 9
Valentine v. Chrestensen, 316 U.S. 52 (1942) ---- 9
Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980) ---- 10
W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) ---- 6, 9, 13, 17
Wooley v. Maynard, 430 U.S. 705 (1977) ---- 6, 13, 17
Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio, 471 U.S. 626 (1985) ---- 9

STATUTES

28 U.S.C. § 1254(l) ---- 1
Colo. Rev. Stat. Ann. § 24-34-601 (West 2016) ---- 1, 22

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. I ---- 22

OPINIONS BELOW

The opinion of the trial court granting summary judgment for Respondents is reported at 405 F. Supp. 3d 907 (D. Colo. 2019). The opinion of the court of appeals affirming is reported at 6 F.4th 1160 (10th Cir. 2021).

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on July 26, 2021. The petition for a writ of certiorari was filed on September 24, 2021, and was granted on February 22, 2022. 142 S. Ct. 1106. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(l).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The full statutory provisions are reproduced in an appendix to this brief.

Colo. Rev. Stat. Ann. § 24-34-601(1) (West 2016) defines a public accommodation as "any place of business engaged in any sales to the public and any place offering services . . . to the public."

Colo. Rev. Stat. Ann. § 24-34-601(2)(a) (West 2016) (hereinafter the "Accommodations Clause") prohibits a public accommodation from "refus[ing] . . . an individual or a group, because of . . . sexual orientation, . . . the full and equal enjoyment of [its] goods, services, facilities, privileges, advantages, or accommodations."

Colo. Rev. Stat. Ann. § 24-34-601(2)(a) (West 2016) (hereinafter the "Communications Clause") prohibits a public accommodation from "publish[ing] . . . any written, electronic, or printed communication, notice, or advertisement that indicates that the full and equal enjoyment of [its] goods [and] services . . . will be refused, withheld from, or denied an individual . . . because of . . . sexual orientation."

STATEMENT OF THE CASE

Petitioners Lorie Smith and her for-profit graphic and website design company, 303 Creative LLC, (collectively, "Petitioners") brought a pre-enforcement challenge to Colorado's Anti-Discrimination Act ("CADA") on free speech, free exercise, and vagueness and overbreadth grounds. Petitioners intend to offer custom wedding websites for customers celebrating an opposite-sex wedding but intend to refuse to create such websites for customers celebrating a same-sex wedding. *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1170 (10th Cir. 2021). Petitioners contend that creating same-sex wedding websites for customers expresses a message about marriage that violates their religious convictions. *Id.* Petitioners intend to publish a statement explaining this policy (the "Proposed Statement"):

> These same religious convictions that motivate me also prevent me from creating websites promoting and celebrating ideas or messages that violate my beliefs. So I will not be able to create websites for same-sex marriages or any other marriage that is not between one man and one woman. Doing that would compromise my Christian witness and tell a story about marriage that contradicts God's true story of marriage – the very story He is calling me to promote. *Id.*

Petitioners brought this pre-enforcement challenge because their new policy potentially exposes them to liability under CADA's Accommodations Clause, and the Proposed Statement potentially exposes them to liability under CADA's Communications Clause. The district court ruled that Petitioners did not have standing to challenge the Accommodations Clause and granted summary judgment in favor of Respondents on the Communications Clause challenge. *303 Creative LLC v. Elenis*, 405 F. Supp. 3d 907, 912 (D. Colo. 2019). The court of appeals held that Petitioners did have standing to challenge the Accommodations Clause and affirmed summary judgment for Respondents. *Elenis*, 6 F.4th at 1175.

SUMMARY OF ARGUMENT

The Court should uphold CADA as it applies to Petitioners against Petitioners' free speech challenge. Petitioners do not have a compelled speech claim against Respondents for enforcing the Accommodations Clause because Petitioners' website design services are not protected speech. Compelled 'speech' receives First Amendment protection when the speech is understood to be the speaker's own message, when the state is universally mandating an affirmation of belief, or when the speech pertains to matters of public concern. Petitioners' design services are not understood to be Petitioners' expression, the Accommodations Clause does not mandate any affirmation of belief, and the content of the websites pertain to private events, not matters of public concern.

If the Court holds that Petitioners' services are protected speech, the Court should apply intermediate scrutiny, not strict scrutiny, to the Accommodations Clause. Intermediate scrutiny is applied to content-neutral speech regulations, particularly when the speech does not relate to matters of public concern. The Accommodations Clause is a content-neutral regulation because it is unrelated to any particular expression, topic, or message, and it is justified without reference to any expression or viewpoint. Colorado is not compelling a particular message but merely requiring equal access to a supposedly expressive public accommodation.

Even under strict scrutiny, the Accommodations Clause should be upheld because it is necessary, narrowly tailored, and the least restrictive means of achieving Colorado's compelling interest in equal access to publicly available goods and services. The Accommodations Clause does not restrict Petitioners' ability to speak their preferred message, but, as with public accommodation laws throughout this country's history, it provides the societal benefits of economic and political inclusion.

Because Petitioners' discriminatory policy is unlawful, the Communications Clause does not violate the First Amendment by prohibiting Petitioners from advertising that policy.

ARGUMENT

I. The Accommodations Clause Is a Permissible Regulation of Discriminatory Commercial Conduct that Does Not Violate the Free Speech Clause as Applied to Petitioners' Intended Activities.

The Accommodations Clause should be upheld as applied because Petitioners' website design services are not protected speech, which disposes Petitioners' compelled speech claim. Even if the Court were to grant free speech protection to these services, the Court should apply intermediate scrutiny to the Accommodations Clause as a content-neutral regulation of conduct that targets no particular message or viewpoint. Even applying strict scrutiny, however, the Court should uphold the Accommodations Clause as it has upheld prior public accommodations laws as narrowly tailored to achieve a compelling government interest in equal access to publicly available goods and services.

A. Petitioners' website design services are not Petitioners' expression, nor do the websites pertain to matters of public concern; therefore, they are not protected speech.

Petitioners' website design services do not implicate the Free Speech Clause because these services are not protected speech. The services are not understood to be Petitioners' expression, so the Accommodations Clause is not compelling Petitioners' expression. Additionally, the websites at issue are matters of private, not public concern and therefore receive limited First Amendment protection.

1. Petitioners' website design services are not understood to be Petitioners' expression.

Petitioners' website design services are not Petitioners' expression and therefore not protected speech under the First Amendment. The Court has consistently rejected "that an

apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). Conduct is not speech "merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 62 (2006). Instead, a party is engaged in protected speech when an "intent to convey a particularized message is present, and [] the likelihood is great that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)). Specifically in compelled speech cases, the Court does not consider a party to be engaged in protected speech unless viewers understand the message to be that party's expression.

In *Rumsfeld*, for example, the Court held that Congress did not compel law schools to speak when it mandated that law schools "send e-mails and post notices on behalf of the military" as they do for other employers. *Rumsfeld*, 547 U.S. at 61. The Court reasoned that "students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so." *Id.* at 65. Equal treatment of military recruiters' speech does not "suggest[] that law schools agree with any [of their] speech." *Id.* In *Turner Broad. Sys., Inc. v. FCC*, the Court upheld a federal statute requiring cable television providers to carry a certain amount of local stations. 512 U.S. 622 (1994). The statute does not compel expression by cable providers because "[g]iven cable's long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations . . . convey ideas or messages endorsed by the cable operator." *Id.* at 655. Likewise, the Court considered it unlikely that "views expressed by members of the public in passing out pamphlets or seeking signatures for a petition" will be "identified with" those of a shopping center's owner. *PruneYard Shopping Ctr. v. Robins*, 447

U.S. 74, 87 (1980). Therefore, the Court held that California may protect members of the public who attempt to speak or petition on the property of a privately-owned shopping center to which the public is invited.

In this case, Petitioners engage in conduct 'carried out by means of language' when they produce custom websites with words, designs, and images. However, no viewers of these websites would identify Petitioners with the expression contained therein. As proprietors of a custom graphic design business which the public is invited to patronize, Petitioners are merely a conduit for the speech of customers who lack the skills to design a website themselves. Petitioners promise to create bespoke websites at the request of a particular customer. People do not commonly associate print shop owners who print custom photographs with the content of the photos, IT specialists who code workplace-specific management tools with a client company's business model, nor florists who arrange bouquets with the customer's Valentine's Day endeavors. All of those businesses are "custom" services, but the proprietors' skills are serving the customers' wishes. Just as students in *Rumsfeld* could distinguish the school's speech from the recruiter's speech, people can appreciate the difference between speech a graphic designer authors and speech the graphic designer creates for another because they are legally required to do so. Because Petitioners are not seen to be endorsing or agreeing with the speech requested by their customers, their websites are not protected expression under the First Amendment.

While Petitioners cite *Wooley v. Maynard*, 430 U.S. 705 (1977), and *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), *Rumsfeld* explicitly distinguished those two cases as a "far cry" from laws like CADA. *Rumsfeld*, 547 U.S. at 62. Even though few people would associate drivers or schoolchildren with the state motto or the Pledge of Allegiance, the Court deemed both to be compelled speech because the statutes in those cases universally mandated an affirmation of

belief. *Id.* By contrast, the military recruitment law in *Rumsfeld* "does not dictate the content of the speech at all, which is only 'compelled' if, and to the extent, the school provides such speech for other recruiters." *Id.* The Court emphasized that "there is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse." *Id. See also PruneYard*, 447 U.S. at 88 ("Petitioners are not similarly being compelled to affirm their belief in any governmentally prescribed position or view."). Likewise, the Accommodations Clause is not a government-mandated pledge nor a compelled affirmance of belief about sexual orientation. Petitioners are not compelled to create any content nor to affirm any belief about marriage. Petitioners must only offer a service to LGBT customers if and to the extent they provide the same service to the heterosexual customers. Thus, *Wooley* and *Barnette* do not apply.

Petitioners may also argue that while they are not seen as endorsing a customer's message, they should not be forced to host or accommodate that message. However, mandated speech accommodation only implicates the Free Speech Clause when "the complaining speaker's own message was affected by the speech it was forced to accommodate." *Rumsfeld*, 547 U.S. at 63. In *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 561 (1995), the Court allowed parade organizers to refuse marchers looking to express LGBT pride. The Court "concluded that because 'every participating unit affects the message conveyed by the [parade's] private organizers,' a law dictating that a particular group must be included in the parade 'alter[s] the expressive content of th[e] parade.'" *Rumsfeld* 547 U.S. at 63-64 (alteration in original) (quoting *Hurley*, 515 U.S. at 572-73). Similarly, in *Tornillo*, "[the Court] recognized that 'the compelled printing of a reply . . . tak[es] up space that could be devoted to other material the newspaper may have preferred to print,' and therefore . . . alter[s] the message the paper wished to

express." *Rumsfeld* 547 U.S. at 64 (quoting *Mia. Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256, 258 (1974)).

Unlike parade organizers and newspapers, Petitioners are not expressing a message by operating their business; they are merely providing a publicly available service. Petitioners create whatever content and post whatever messages their customers demand. Thus, Petitioners have no message for the accommodated speech to affect in the first place. Even though the Proposed Statement on 303 Creative's website expresses a message about Petitioners' Christian faith, that message is spatially and logically distinct from the websites that Petitioners create for their customers. Unlike parade watchers who associate each 'unit' with the parade's message, viewers of distinct websites are unlikely to associate any one website with the message of another unrelated website. Therefore, the wedding websites do not 'alter' the expressive content of Petitioners' message. Further, unlike the newspaper in *Tornillo*, 303 Creative operates over the internet and is therefore not bound by space limitations to relay its message. Thus, Petitioners have no claim that their free speech rights are being violated, and the Free Speech Clause does not apply.

Applicant Details

First Name	**Mariam**
Last Name	**Oladipo**
Citizenship Status	**U. S. Citizen**
Email Address	**moladipo@uchicago.edu**
Address	**Address** Street **8 E 9th St, APT 1301** City **Chicago** State/Territory **Illinois** Zip **60605** Country **United States**
Contact Phone Number	**4849400817**

Applicant Education

BA/BS From	**Pennsylvania State University-University Park**
Date of BA/BS	**May 2019**
JD/LLB From	**The University of Chicago Law School** **https://www.law.uchicago.edu/**
Date of JD/LLB	**June 1, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**The Chicago Journal of International Law**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Fahey, Bridget
bfahey@uchicago.edu
720-272-0844
Ben-Shahar, Omri
omri@uchicago.edu
773-702-9494
Davidson, Adam
davidsona@uchicago.edu

References

Omri Ben-Shahar: 773-702-2087; omri@uchicago.edu; Adam Davidson: 773-702-9494; davidsona@uchicago.edu; Bridget Fahey: 773-702-9494; bfahey@uchicago.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

8 E 9th St APT 1301
Chicago, IL 60605
(484) 940-0817

July 6, 2023

The Honorable Stephanie Dawkins Davis
United States Court of Appeals for the Sixth Circuit
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

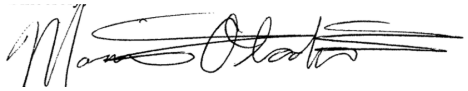
I am a rising third-year law student at the University of Chicago Law School, and I am applying for a clerkship in your chambers for the 2024 term. I have a strong interest in appellate litigation, administrative law, and antitrust litigation. I also have a strong interest in immigration pro bono work. I would welcome the opportunity to learn more about the appellate process through a clerkship in your chambers.

I have developed strong legal research and writing skills both in academic and employment settings. While working as a summer associate at Perkins Coie, I conducted legal research spanning over a wide range of practice areas including litigation, personal planning, and antitrust. I regularly wrote legal memos synthesizing my legal research, and drafted various communications to be shared with clients. As a research assistant for Professor Briget Fahey, I conducted legal research into various cases discussing the meaning of "legislature" as used under Article V of the U.S. Constitution. Finally, I recently wrote-on to The Chicago Journal of International Law where I will serve on the board as an Articles Editor. In addition, I am currently working on a comparative law comment for the journal, comparing the antitrust laws of the U.S., E.U., and China regarding informal guidance.

A resume, transcripts, and writing sample are enclosed. Letters of recommendation from Professors Omri Ben-Shahar, Adam Davidson, and Bridget Fahey will arrive under separate cover.

Should you require any additional information, please do not hesitate to let me know.

Sincerely,



Mariam Oladipo
Enclosures

MARIAM OLADIPO

8 E 9th St APT 1301, Chicago, IL 60605 • moladipo@uchicago.edu • (484) 940-0817

EDUCATION

The University of Chicago Law School, Chicago, IL
J.D. Candidate — June 2024
Journal: The Chicago Journal of International Law (*Articles Editor*)
Activities: Hinton Moot Court Board (*Co-President*); American Constitutional Society (*Social/Membership Chair*); Black Law Students Association (*Treasurer*); International Arbitration Club (*Treasurer*); Law School Musical Board (*Senior Writer*); Orientation Director; Women's Mentoring Program (*Co-Chair*)
Volunteer: Big Sib-Little Sib Program (*Big Sib*); International Fellows Program (*Fellow*); Street Law (*Instructor*)

The Pennsylvania State University (PSU), University Park, PA
cum laude, B.A. in Political Science; *B.A.* in Economics; *Minor* in Latin — May 2019
Honors: Phi Beta Kappa; Pi Sigma Alpha (National Political Science Honor Society)
Activities: PSU Mock Trial Team (*Captain and Attorney*); PSU THON (*Captain*); Hockey Management Association; Baking and Cooking Club

EXPERIENCE

Covington & Burling LLP, Washington, DC — Summer 2023
Summer Associate

The University of Chicago Law School, Chicago, IL — Summer 2022
Research Assistant for Professor Bridget Fahey
Conducted legal research and prepared a legal memorandum discussing the definition of "legislature" as used in Article V of the U.S. Constitution.

Perkins Coie LLP, Chicago, IL — Summer 2022
1L Diversity Fellow/Summer Associate
Conducted legal research and completed writing assignments in practice areas including litigation, personal planning, and antitrust. Assisted in creating due diligence document matrices for a private company acquisition.

Milton Hershey School, Hershey, PA
Communication Executive Assistant — Sept. 2020 – Aug. 2021
Served as the liaison to the Vice President of Communications for internal and external stakeholders including media representatives at the local, state, and national level. Coordinated meetings, prepared minutes, and conducted research.

Eckert Seamans Cherin & Mellott, LLC., Harrisburg, PA
Legal Secretary — Oct. 2019 – April 2020
Prepared and edited pleadings, court filings, and interrogatories. Maintained client files and conducted research.

Penn State Campus Recreation, University Park, PA
Student Building Supervisor — Spring 2018 – Summer 2019
Facility Attendant — Fall 2017
Assisted with the direct supervision, hiring, and training of Facility Attendants. Provided leadership in dealing with conflicts, emergencies, and enforcement of Campus Recreation policies and procedures.

Hon. Robert P. Casey Jr., U.S. Senate, Harrisburg, PA
Constituent Services Intern — Summer 2016
Coordinated with government agencies and departments to assist constituent concerns and issues. Directed constituents to appropriate government agencies and departments. Created a constituent services manual and pamphlet.

INTERESTS:

Cooking Nigerian cuisine; Writing and playing music on six different instruments.


THE UNIVERSITY OF
CHICAGO

THE UNIVERSITY OF CHICAGO

Name: Mariam Oladipo
Student ID: 12334883

University of Chicago Law School

Academic Program History

Program: Law School
Start Quarter: Autumn 2021
Current Status: Active in Program
J.D. in Law

External Education

Pennsylvania State University
University Park, Pennsylvania
Bachelor of Arts 2019

Beginning of Law School Record

Autumn 2021

Course		Description	Attempted	Earned	Grade
LAWS	30101	Elements of the Law William Baude	3	3	177
LAWS	30211	Civil Procedure William Hubbard	4	4	173
LAWS	30611	Torts Saul Levmore	4	4	180
LAWS	30711	Legal Research and Writing Adam Davidson	1	1	181

Winter 2022

Course		Description	Attempted	Earned	Grade
LAWS	30311	Criminal Law John Rappaport	4	4	172
LAWS	30411	Property Thomas Gallanis Jr	4	4	177
LAWS	30511	Contracts Bridget Fahey	4	4	177
LAWS	30711	Legal Research and Writing Adam Davidson	1	1	181

Spring 2022

Course		Description	Attempted	Earned	Grade
LAWS	30712	Legal Research, Writing, and Advocacy Adam Davidson	2	2	179
LAWS	30713	Transactional Lawyering Douglas Baird	3	3	179
LAWS	40101	Constitutional Law I: Governmental Structure Bridget Fahey	3	3	176
LAWS	44201	Legislation and Statutory Interpretation Ryan Doerfler	3	3	182
LAWS	47411	Jurisprudence I: Theories of Law and Adjudication Brian Leiter	3	3	174

Autumn 2022

Course		Description	Attempted	Earned	Grade
LAWS	41501	Conflict of Laws William Baude	3	3	174
LAWS	43200	Immigration Law Amber Hallett	3	3	176
LAWS	43228	Local Government Law Lee Fennell	3	3	173
LAWS	53464	Public International Law Mary OConnell	3	3	176
LAWS	63402	Workshop: Public Law and Legal Theory Bridget Fahey Genevieve Lakier William Baude Curtis Bradley Jonathan Masur Richard Mcadams Thomas Ginsburg Joshua C. Macey	1	1	P

Winter 2023

Course		Description	Attempted	Earned	Grade
LAWS	46101	Administrative Law David A Strauss	3	3	173
LAWS	53201	Corporate Criminal Prosecutions and Investigations	3	3	180
Req Designation:		Meets Writing Project Requirement Andrew Boutros			
LAWS	53308	Food Law Omri Ben-Shahar	3	3	178
LAWS	63402	Workshop: Public Law and Legal Theory Bridget Fahey Genevieve Lakier William Baude Curtis Bradley Jonathan Masur Richard Mcadams Thomas Ginsburg Joshua C. Macey	0	0	P
LAWS	81002	Strategies and Processes of Negotiation George Wu	3	3	177

Date Issued: 07/01/2023

THE UNIVERSITY OF CHICAGO

Name: Mariam Oladipo
Student ID: 12334883

University of Chicago Law School

Spring 2023

Course		Description	Attempted	Earned	Grade
LAWS	41601	Evidence John Rappaport	3	3	174
LAWS	42801	Antitrust Law Eric Posner	3	3	176
LAWS	52201	Education Law & Policy Susan Epstein	3	0	
LAWS	53485	Constitutional Procedure Ramon Feldbrin	3	0	
LAWS	63402	Workshop: Public Law and Legal Theory Bridget Fahey Genevieve Lakier William Baude Curtis Bradley Jonathan Masur Richard Mcadams Thomas Ginsburg Joshua C. Macey	0	0	P

End of University of Chicago Law School

Date Issued: 07/01/2023

Bridget Fahey
Assistant Professor of Law
The University of Chicago Law School
1111 E. 60th Street
Chicago, IL 60637
bridget.fahey@uchicago.edu | 773-702-1184

June 25, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I am pleased to recommend Mariam Oladipo for a clerkship in your chambers. I had the pleasure of teaching Mariam in my Constitutional Law course last spring. And I was so impressed by her during the quarter that I asked her to be my research assistant, a role in which she has performed wonderfully. Mariam is a talented student and an extraordinary person.

She has grit and resilience, but also a deep wisdom that many in our law school community—from faculty to staff to students—have noticed. She is a treasured member of our community and will be a terrific lawyer.
The Constitutional Law course in which I taught Mariam is a large first year class—with 66 students in a cavernous room. I manage the class as a Socratic dialogue, in which I "cold call" students (that is, call on them without prior notice) and use their engagement to develop lessons about how to read and understand Supreme Court cases. In this challenging setting, the students who distinguish themselves are able to think quickly and deeply on their feet, they are kind and polite to their fellow students, and they always prepared. Mariam demonstrated each of those qualities from the very beginning of the quarter. When I quizzed her about the facts and holdings of cases we read, she summarized them with a level of nuance and concision that is unusual for students in their first year of law school. But her contributions also built up the contributions of her classmates. She is a person who really hears what others have to say—even when that person is sitting on the other side of a large room. And I could tell that when Mariam built upon or praised the contributions of a classmate, it really meant something. She is clearly highly respected among her classmates. We are fortunate to have many terrific students at the law school, who throw themselves into the law school experience with intensity and purpose. But, even among this distinguished group, Mariam stood out for her dedication and preparedness.

I was also impressed by Mariam's out-of-classroom presence. I schedule coffees with my 1L students in small groups (usually 6-8). Those are the moments in which I feel I can really get to know my students and understand what motivates them. I remember Mariam vividly from that coffee. Whereas many of her classmates solicited advice on relatively narrow topics—how to succeed on a law school exam or how to get a prestigious clerkship—Mariam asked for broader guidance about how to use the law to productively advance the best version of the Constitution and how to make the law a mechanism for change. Those questions shifted the course of our discussion and the lovely conversation about how to effect change that followed— which Mariam was central to—made me appreciate in her a unique capacity for humble leadership.

I was so impressed by Mariam that, even before she took my exam, I invited her to be one of my three summer research assistants. In that role, Mariam met my very high expectations of her. She produced comprehensive research supplemented by keen legal analysis on the caselaw surrounding Article V's process for amending the federal constitution. She read over twenty law review articles and dozens of cases to assemble a comprehensive account of the ambiguities, issues, and arguments that have previously arisen in the constitutional amendment process. Her prose was crisp and clear. And she had an intuitive sense of how to identify and prioritize the most important points—a sense that many students in the summer after their 1L year have yet to refine.

As I have gotten to know Mariam and learned about her background, I have come to understand how she came to law school so well-equipped to confront the challenges of a new and unfamiliar environment. Mariam is one of five children, raised by a single mother in Pottstown, Pennsylvania. Her mother immigrated from Nigeria to the United States shortly before she was born and she is a first generation college and professional school student. Mariam's resilience, boldness, and grace were hard-won, forged during a childhood that was often too close to the margins— including periods of homelessness and food scarcity. She has channeled her experiences into a determination and tool-kit of success that I know will lead her to distinguished places. She has already succeeded in law school. But when I have talked with her about her career ambitions—to use a multi-faceted set of instruments, including law and business to help families like hers thrive in the United States—I have understood that this is only the beginning of what will be a life of success through service.
Miriam will be a terrific law clerk. She will, in my view, be terrific at whatever she chooses to do. I would be delighted to further sing her praises if I can be helpful.

Sincerely,

Bridget Fahey - bfahey@uchicago.edu - 720-272-0844

Bridget Fahey

Bridget Fahey - bfahey@uchicago.edu - 720-272-0844

Omri Ben-Shahar
Leo Herzel Professor in Law
University of Chicago Law School
1111 East 60th Street | Chicago, Illinois 60637
phone 773-702-2087 | fax 773-702-0730
e-mail omri@uchicago.edu
home.uchicago.edu/omri

June 29, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I understand that Ms. Mariam Oladipo is applying to you for a clerkship. I know Ms. Oladipo well. She was a prominent student in a 20-student seminar on Food Law and Regulation that I taught from The University of Chicago Law School in Winter 2023. She was a wonderfully smart and engaging student, a frequent commenter with a lively mind, and an interesting and upbeat human being. I strongly recommend her for the position of a clerk.

The best evidence I have for writing this letter is the seminar paper Ms. Oladipo wrote under my supervision. In the paper, she tackled the merits of the antitrust exemption accorded to agricultural cooperatives, under the Capper-Volstead Act. In the most clear and concise manner, Ms. Oladipo describes the ongoing process of consolidation and concentration occurring in many agricultural sectors, whereby the cooperatives grow in size and gain in power vis-à-vis their member farmers. She advances the claim that such realignment of economic leverage ultimately hurts the farmers, and potentially also the consumers. She demonstrates the potential harms by studying the various lawsuits brought by farmers against their cooperatives in the era of consolidation. The paper concludes by proposing various corrective strategies to better level the playing field, all within the scope of the Capper-Volstead Act.

I greatly appreciated the boldness of this study. Ms. Oladipo researched an area of law that has never been taught in any of her classes. It lies in the boundary between economic regulation and core antitrust law and requires mastery both of economics and black letter law. She describes the relevant economics facts and the legal background in the clearest and most intelligent manner, and she helpfully shows the reader the misalignment between the Act's goals and the present market realities. This is the kind of legal research that perfectly fits the position of a clerk, assigned to research novel questions but fit them within existing legal templates. I was also encouraged by the "tone" of the paper. Rather than making bombastic proposals for change, Ms. Oladipo maintains her focus throughout the study on what may realistically be done, within granted authority of agencies and discretion of courts, to mitigate the scope of the problem. She weaves in economic background with legal doctrine in the most useful and transparent manner.

I had several meetings with Ms. Oladipo and learned a lot about the impressive lifelong achievements of this brave woman. A first-generation college student in her family, she and her four siblings immigrated with their mother from Nigeria and grew up in extreme circumstances of deprivation. But while she may have lacked for food and shelter, Ms. Oladipo has acquired the courage, motivation, and resilience to confront any difficulty. She does not shy away from any challenge, and she has the ambition to harness the hardships she encountered in a manner that helps others. Tellingly, she is writing a book about her autobiographic experience (as well as a novel) and has the goal of building a professional career centered around helping people facing similar challenges. Not many students arrive at the University of Chicago Law School with the deck so drastically stacked against them; fewer yet succeed with such positive and selfless attitude. All this leads me to believe that Ms. Oladipo will show you not only sparks of brilliance and an impressive work ethic. She is a graceful person with the warmest demeanor, one whose presence in chambers will energize everyone and whom you will be proud to mentor.

Sincerely,

Omri Ben-Shahar

Adam Davidson
Assistant Professor of Law
University of Chicago Law School
1111 East 60th Street | Chicago, Illinois 60637
phone 773-834-1473 | fax 773-702-0730
e-mail : davidsona@uchicago.edu
www.law.uchicago.edu/people/adam-davidson

June 25, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I write to recommend Mariam Oladipo for a clerkship in your chambers.

I would not call Mariam an unassuming person—when you meet her you quickly realize that she has both the sort of positive energy that attracts people to her and the necessary intelligence and force of will to accomplish whatever she might like to do. But no matter what initial assumptions you might make about her, I guarantee that you are still almost certainly underestimating her.

I had the pleasure to teach Mariam legal research and writing during her first year of law school. Based on that experience and my later conversations with her, I fully expect Mariam to reach the highest heights of the legal profession. Mariam's grades in my class were a 181 and a 179, both above the median. She received those grades because, quite simply, she is a thorough researcher, a clear writer, and a creative legal thinker.

Mariam says that her long term goal is to join the judiciary. While it's virtually impossible to determine whether any particular person will get a judgeship, I have no doubt in Mariam's ability to do the job and to do it well.

Part of my confidence of course stems from Mariam's academic performance. As I have said, she did very well in my class, displaying the exact skills necessary to reach the peak of the legal profession. And her transcript and resume more broadly are those of a successful student. Indeed, it seems that her transcript, while good, actually understates both her potential and achieved success. That is clear to me because in one of the classes in which she received a below-median grade, the professor hired her to be a research assistant for the coming year. But what makes me so confident in Mariam's potential to be an excellent judge is the combination of her intellectual and academic acumen, the life that she's led, and the person that life has led her to become.

Mariam has not had an easy life. Raised by her mother as the middle child and only daughter of five siblings, her family struggled greatly at times. There were points when they were unhoused, or had to live in shelters, or were food insecure. Because Mariam's mother was an immigrant, she struggled to find well-paying work. And so even when they had an apartment, they had to deal with pests—rats, insects—and other nuisances. But Mariam's fate seemingly changed when her mother successfully enrolled her in the Milton Hershey School, an all-expenses-paid private residential school created by the Hershey (of Hershey chocolate) family. Mariam speaks incredibly highly of the school, as she recognizes how much the resources, training, and opportunity it provided to her likely changed her life. Nevertheless, I can only imagine that life there was not entirely idyllic. It is clear that Mariam deeply loves her family, and so being apart from her mother and at least one sibling (her younger brothers joined her there eventually) for extended periods of time must not have been easy. And it is perhaps telling that among the skills she learned there, she mentions code switching—the social and linguistic dance that many BIPOC people find necessary to undertake to survive and thrive in primarily white spaces. Moreover, at the same time she was thriving at the Hershey School, her mother and older brother continued to struggle with poverty.

Given the life that she has led, I would not be surprised, and I would not begrudge her, if Mariam had a substantial chip on her shoulder. I would completely understand if she was angry about the thorny path that she walked to get to where she is versus the smooth, rose-lined one of many of her classmates. If she was standoffish, or bitter, or chose to focus solely on herself and living the life of material luxury that a career in private practice could provide, I would not blame her for a moment.

But that is not Mariam. That is not Mariam at all. Indeed, the only word that I can think of to describe interacting with Mariam is joy. Deep, infectious, joy. It is nigh impossible to come away from a conversation with Mariam and not feel better about the world. Partially, that is because Mariam has a joyous and positive demeanor. But lots of people have positive demeanors without the sort of preternatural ability to spread that positivity to others.

What sets Mariam apart is the joy with which she talks about her life, her many, varied interests, and her aspirations. It is a joy enveloped by a humility that betrays just how accomplished she is. During one of our first conversations outside of class, at lunch with a group of her classmates, it came up that a few of us played piano, Mariam included. As we went around describing our musical experience, Mariam mentioned—almost offhandedly—that she also plays five other instruments: flute, clarinet, cello, handbells, and guitar. In that same conversation, Mariam also mentioned that she's in the process of writing several books, one autobiographical and the other a novel that, given how the story is apparently progressing, may turn into a trilogy. And this does not begin to touch on her many law school-related activities and leadership positions.

But even more impressive than Mariam's accomplishments are her actions and aspirations. Mariam, true to form, has not rested on her laurels or been content to enjoy her own success. Instead, she has used the lessons she learned and the skills she developed navigating institutions to reach back and help her mother and siblings begin to thrive, guiding them through their immigration issues as well as the complex structures of educational and financial institutions. And here in Chicago, her work has expanded beyond her family, as she has served as a co-chair of the Women's Mentoring Program at the Law School and has been a Street Law Instructor, going into local high schools to teach students about the law and their rights.

As I said earlier, Mariam aspires to join the judiciary. Admittedly, in part because of the position's prestige and power, lots of law students aspire to be judges, and so one does not usually think of seeking that position as necessarily noble or sacrificial. But I do view Mariam's judicial aspirations as a noble pursuit. Because I do not think she seeks that post for its prestige. Instead, I think Mariam wants to be a judge because the life that she has led has made her more understanding, more willing to give to those who don't have her gifts and abilities, and more desirous to make the country, and the world, a better place. She sees in the judiciary an avenue to achieve those goals. While I don't know if any single judge can change the world, I have no doubt that Mariam can and will attempt to make the world better for each litigant who comes within her presence, both as a law clerk and perhaps one day as a judge herself.

I happily recommend Mariam for a clerkship in your chambers.

Sincerely,

Adam Davidson

Adam Davidson - davidsona@uchicago.edu

MARIAM OLADIPO
8 E 9th St APT 1301, Chicago, IL 60605 • moladipo@uchicago.edu • (484) 940-0817

WRITING SAMPLE #1

I prepared the attached writing sample for my Legal Research & Writing class at the University of Chicago Law School. I was asked to write a brief for the defendant-appellee, Davidson Datavault, LLC, arguing that the U.S. District Court for the Northern District of Illinois did not err in granting the defendant's motion to dismiss for lack of Article III standing, focusing on the issue of injury in fact. We wrote the brief without having read the appellant's brief. The assignment was self-edited. To create a 10-page sample, I focused on the argument section.

Summary of the Facts

Davidson Datavault, LLC ("Datavault"), defendant-appellee, is a Delaware-based corporation, who provides an online digital vault that stores customer usernames, passwords, and financial and personal details.

Danny Midway, plaintiff-appellant, is a University of Chicago graduate and a small business owner, who resides in Chicago, Illinois. Midway's business sells custom University of Chicago apparel. Midway used Datavault's services, storing all usernames and passwords for his business, including login information for his social media accounts, financial accounts, and online storefronts in Datavault. Additionally, Midway stored his bank account and routing numbers and his full credit card number, expiration date, and security code.

The Department of Homeland Security (DHS) issued a public notice about a potential security vulnerability in Shaffer Software, which is used in the creation of millions of websites and apps. DHS noted that an "Alison Attack" could be used to exploit the vulnerability and advised that apps that used Shaffer Software to quickly update to the latest version.

Datavault, which uses Shaffer Software, quickly updated to the latest version on October 1, 2020. When updating the software, Datavault found that an Alison Attack had occurred on its system at some point between September 1 and October 1, 2020. Datavault immediately informed all its customers about the breach and the information that was able to be downloaded. Datavault informed users that their digital vaults could not be accessed without decrypting their encrypted passwords and offered free credit monitoring and identity theft protection.

Ten tech companies are known to have had Allison Attacks. Only two have been linked to incidents of identity theft and only one hundred incidents have been traced to their breaches.

Having been a previous victim of fraud due to a data breach, Midway asserted that he became fearful and took extreme steps in response to Datavault's notification. In addition to accepting Datavault's offer, Midway manually changed his usernames and passwords by phone rather than online, cancelled his credit card, and froze his credit. Midway waited until December 2020 to get a new credit card and unfreeze his credit. Midway was only able to fulfill one hundred orders out of 4,000 for his business during that time. In addition, Midway asserted that he experienced anxiety, insomnia, and had trouble focusing on work. Notably, Midway does not allege that he or any other Datavault user has had their identity stolen or experienced any fraudulent transactions stemming from the Datavault breach.

Midway filed an action against Datavault for negligence and breach of contract under Illinois law seeking damages of more than $100,000. Datavault then moved for motion to dismiss for lack of Article III standing under Federal Rules of Civil Procedure Rule 12(b)(1).

The district court granted Datavault's motion to dismiss, on the grounds that Midway did not suffer an injury in fact. The district court then entered judgment in favor of Datavault.

This appeal then followed.

SUMMARY OF THE ARGUMENT

The district court did not err in granting Datavault's motion to dismiss for lack of Article III standing because the district court correctly determined that Midway has not suffered an injury in fact. Midway has alleged that he has suffered three different harms stemming from the Datavault data breach and that each harm is sufficient to establish an injury in fact. The Court should not take Midway's assertion to be true on its face. Rather, the Court must determine whether each harm separately constitutes an injury in fact.

First, Midway has not suffered an injury in fact from the risk of fraud. Midway is not able to show that the risk of fraud has materialized. In fact, Midway does not even allege that he or any other Datavault user has experienced fraudulent transactions or identify theft stemming from the data breach. In addition, Midway cannot show that the risk of fraud is likely to materialize. Rather, there is evidence showing that there is a virtually non-existent risk of injury, less than 1% likelihood, stemming from Alison Attack data breaches among ten tech companies, including Datavault. Next, Midway has not suffered an injury in fact from the prevention costs he incurred because those costs do not establish standing on their own and they were self-inflicted out of fear. Midway admits that the prevention costs stemmed from a fear of fraud. However, prevention costs are not warranted for harms that are not imminent and cannot establish an injury in fact. Lastly, Midway has not suffered an injury in fact from mere anxiety. Midway has established that he regularly sees a therapist for anxiety. However, Midway cannot show that the risk of fraud caused his anxiety on its own. In addition, Midway does not provide any evidence that emotional distress can establish standing on its own. Rather, analogy to the law of torts indicates that it cannot.

There are two other requirements needed to establish Article III standing: causation and redressability. However, these two requirements do not require much analysis because regardless of if they are met, Midway cannot establish Article III standing because he cannot show that he suffered an injury in fact.

Given that above analysis, Midway has not met all of the requirements to establish Article III standing. Accordingly, the district court did not err in granting Datavault's motion to dismiss Midway's complaint for lack of Article III standing.

ARGUMENT

I. Standard of Review

A district court's decision to dismiss for lack of Article III standing is reviewed *de novo*, where the district court must accept all material allegations of the complaint as true, drawing all reasonable inferences in favor of the plaintiff, "unless standing is challenged as a factual matter." *Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963, 966 (7th Cir. 2016) (citing *Reid L. v. Ill. State Bd. of Educ.*, 358 F.3d 511, 515 (7th Cir. 2004)). The plaintiff bears the burden of proof in establishing Article III standing. *Id.* (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)). To establish Article III standing, the plaintiff must show that "(i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion LLC v. Ramirez*, 141 S.Ct. 2190, 2203 (2021) (citing *Lujan*, 504 U.S. at 560-61). In addition, the plaintiff must establish standing for each claim they assert and for each form of relief they seek. *Id.* at 2208 (citing *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008)).

II. The District Court Did Not Err in Granting Datavault's Motion to Dismiss for Lack of Article III Standing because the District Court Correctly Determined that Midway Has Not Suffered an Injury in Fact.

To establish Article III standing, the plaintiff must show that they "suffered an injury in fact that is concrete, particularized, and actual or imminent." *Id.* at 2203. Midway asserts that "he was injured because (1) he faces an increased risk of fraud, (2) he has incurred costs to prevent costs, and (3) he is in emotional distress" and that any of these harms constitutes an injury in fact. R9-R10. A plaintiff must establish standing for each claim they assert and for each form of relief they seek. *TransUnion*, 141 S.Ct. at 2208 (citing *Davis,* 554 U.S. at 734). As such, for each harm that Midway asserts, it is important to determine if it is an injury in fact on its own, as "standing is not dispensed in gross." *See id.*

A. Midway Has Not Suffered an Injury in Fact from the Mere Risk of Fraud because the Risk is Not Concrete nor Imminent.

1. Midway's Mere Risk of Fraud is Not Concrete because it Has Not Materialized.

The Supreme Court established that "a concrete injury is real, and not abstract" in *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016). *Pierre v. Midland Credit Mgmt., Inc.*, 29 F.4th 934, 937-38 (7th Cir. 2022) (citing *Spokeo*, 578 U.S. at 340) (internal quotations omitted). The Supreme Court established in *TransUnion* that mere risk of harm can only qualify as concrete for claims seeking injunctive relief. *Id.* at 938 (citing *TransUnion*, 141 S.Ct. at 2210). For an action seeking money damages, risk of harm can only be concrete if it materializes. *See id.* at 938 (citing *TransUnion,* 141 S.Ct. at 2210-11). To determine if there is a material risk of harm from a data breach, two factors are important: "(1) the sensitivity of the data in question… and (2) the

incidence of fraudulent charges and other symptoms of identity theft." *Kylie S. v. Pearson PLC,* 475 F.Supp.3d 841, 846 (N.D. Ill. 2020) (internal citations and quotations omitted.)

Midway has not suffered an injury in fact because the risk of fraud has not materialized. Midway asserts that he has suffered an increased risk of fraud due to the data breach. *See* R9. Following the breach, Datavault informed Midway and its other users about what information was able to be downloaded from their accounts, including financial account information and social security numbers. R5. While financial account information and social security number may constitute sensitive data, Midway has not alleged that he or any other Datavault user has experienced any fraudulent transactions or have had their identities stolen. R8. In fact, no incidents of identity theft stemming from known data breaches from Alison Attacks have been traced to Datavault. *See* R6. Because of this, Midway has not shown that there is a material risk of harm from the data breach nor has the injury materialized from the material risk of harm. Because the mere risk of fraud has not materialized, mere risk of fraud cannot satisfy the concrete element of injury in fact.

2. The Mere Risk of Fraud is Not Imminent because Injury from that Risk Is Not Certainly Impending.

An injury in fact must be "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)) (internal quotations omitted). The Supreme Court established in *Clapper v. Amnesty International USA et al,* 568 U.S. 398 (2013), that for an injury to be imminent, it must be "certainly impending." *See Clapper*, 568 U.S. at 409 (citing *Lujan,* 504 U.S at 565 n.2). Specifically, '"threatened injury must be certainly impending to constitute injury in fact.'" *Id. (*quoting *Whitmore*, 495 U.S. at 158). "Allegations of possible future injury are not sufficient." *Id.* As such, for the mere risk of

fraud, a plaintiff must show that the risk of fraud is certainly impending to constitute an injury in fact.

Midway has not suffered an imminent injury in fact from the mere risk of fraud as it is not certainly impending. Midway has not alleged or shown that his or any other Datavault user has experienced any fraudulent transition or identity theft stemming from the data breach. R8. While the plaintiff may assert that data fraud can happen years from when the data is stolen, like argued by the plaintiff in *Remijas v. Neiman Marcus Group, LLC*, 794 F.3d 688 (7th Cir. 2015), Midway has not shown any evidence that the fraud is imminent. *See Remijas,* 794 F.3d at 694. Rather, there is evidence to the contrary. There are ten tech companies that are known to have had a data breach due to an Alison Attack. R6. Only two of those companies have been linked to incidents of identity theft, with only about one hundred incidents between them. *Id.* This is an extremely low number of incidents, especially when compared to the ten thousand users that Datavault alone has. This would amount to only a 1% chance of identity theft in this case. If the other nine tech companies have a comparable number of users to Datavault, the incidents of identity theft would amount to even less than a 1% chance. The likelihood of fraud in these cases is virtually non-existent. As such, the virtually non-existent risk of fraud is certainly not impending and therefore, not imminent.

B. Midway Has Not Suffered an Injury in Fact from the Extreme Measures He Took to Prevent Costs because those Costs Do Not Establish Standing on Their Own and They Were Self-Inflicted out of Fear.

The Supreme Court asserted in *Clapper* that "[i]n some instances, we have found standing based on a 'substantial risk' that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm." 568 U.S. at 415 n. 5 (citations omitted).

However, Seventh Circuit established in *Remijas* that "mitigation expenses do not qualify as actual injuries where the harm is not imminent." 794 F.3d at 694 (citing *Clapper*, 568 U.S. at 417). As such, plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending. *Clapper*, 568 U.S. at 416 (citations omitted).

The prevention costs that Midway incurred does not establish standing on its own. Given the above analysis regarding the mere risk of fraud, that mere risk has not materialized. In addition, Midway has not shown that the risk of fraud is a certainly impending substantial risk, and therefore imminent. Following *Clapper,* the costs that Midway used to prevent harm were not reasonably incurred because there was no substantial risk of harm. Moreover, the prevention costs were self-inflicted out of fear, with Midway having been a previous victim of fraud due to a date breach. R8. Without a substantial risk of harm, the prevention costs do not qualify as actual injuries because they did not stem from a harm that is imminent and therefore, cannot give the plaintiff standing in this case.

The plaintiff may assert that *Clapper* does not apply in this case as it "was addressing speculative harm based on something that may not even have happened to some or all of the plaintiffs." *Remijas*, 794 F.3d at 694. Rather, they may assert that this case is more like *Remijas* in that the breach has already taken place. *See id.* However, this argument does not stand as the plaintiff does not allege that the breach itself is the harm. Rather, the plaintiff asserts that three separate harms (increased risk of fraud, prevention costs, and emotional distress) stem allegedly from the breach. R9-10. It is this Court's job to determine if those harms give the plaintiff standing in this case. Given the above analysis that the mere risk of fraud has not materialized, is not a substantial risk and therefore not imminent, *Clapper* does apply in this case. As such,

prevention costs to mitigate harm from the mere risk of fraud are not actual injuries. Therefore, prevention costs cannot give the plaintiff standing in this case.

C. Midway Has Not Suffered an Injury in Fact from Mere Anxiety.

1. Midway's Anxiety is Insufficient to Establish Standing because Midway Cannot Show that the Knowledge of Risk of Fraud Caused His Anxiety on Its Own.

The Supreme Court in *TransUnion* put forth the idea that standing could be established if a plaintiff can show that "knowledge of a serious risk caused its own emotional or psychological harm." 141 S.Ct. at 2211 n.7. However, the Court took "no position on whether or how such an emotional or psychological harm could suffice for Article III purposes." *Id.* However, the Seventh Circuit has ruled out this argument in *Pierre*, finding that the plaintiff's emotional distress was "insufficient to confer standing." *See* 29 F.4th at 939 (citing *Wadsworth v. Kross, Lieberman & Stone, Inc.*, 12 F.4th 665, 668 (7th Cir. 2021); *Pennell v. Glob. Tr. Mgmt., LLC*, 990 F.3d 1041, 1045 (7th Cir. 2021)).

Midway's anxiety is insufficient to establish standing. Midway alleges that he became fearful of the risk of fraud stemming from the data breach and that risk of fraud led to his emotional distress. While Midway asserts that he experienced anxiety in relation to the data breach, Midway has not shown that the risk of fraud caused its own anxiety. Rather, there is evidence that Midway suffers from anxiety already, evidenced by Midway seeing a therapist regularly for anxiety. R8. Because of this, Midway cannot show that the risk of fraud caused its own anxiety. As such, Midway cannot establish standing for emotional distress.

The plaintiff might argue that *Pierre* does not apply in this case, arguing that the decision in *Pierre* was in the context of the Fair Debt Collection Practice Act, which is a statutory claim.

See 29 F.4th at 939. In contrast, they might assert that this case does not stem from a statutory claim but rather from common law claims of negligence and breach of contract. As such, the finding in *Pierre* does not apply in this case. However, this still leaves open the question whether emotional harm can establish Article III standing.

The Supreme Court in *TransUnion* is instructive, alluding to analogizing emotional harm for standing to the intentional infliction of emotional distress in tort law. *See* 141 S.Ct. at 2211 n.7 (citation omitted). However, in this case, Midway does not allege that Datavault intended to inflict emotional harm. In fact, Midway does not claim that any of the harms he asserts were intentional. Rather, Midway asserts claims of negligence and breach of contract. R1. As such, it is more appropriate to analogize the emotional harm in this case to the tort of negligent infliction of emotional distress.

2. Analogy to the Tort of Negligent Infliction of Emotional Distress Does Not Show that Emotional Distress in This Case Can Establish Standing.

This case was brought before the U.S. District Court for the Northern District of Illinois and because Midway brought an action for claims of negligence under Illinois law, the state of Illinois's tort law should be examined.

In Illinois, negligent infliction of emotional distress cases can be split into two categories: ones that involve "direct victims" and ones that involve "bystanders." *Lewis v. CITGO Petroleum Corporation*, 561 F.3d 698, 702 (7th Cir. 2009) (citing *Corgan v. Muehling*, 574 N.E.2d 602, 605-06 (Ill. 1991)). Direct victims must satisfy the "impact rule" in that the emotional distress they suffered must be "accompanied by a contemporaneous physical injury to or impact on the plaintiff." *See id.* at 703 (quoting *Rickey v. Chi. Transit Auth.*, 457 N.E.2d 1, 2 (Ill. 1983)) (quotations omitted). Bystanders must satisfy the "zone-of-physical danger" test and

must be a person '"who, because of the defendant's negligence, [had] reasonable fear for [their] own safety' which caused them emotional distress, and who could demonstrate physical injury or illness resulting from the emotional distress." *Id.* (citing *Kapoulas v. Williams Ins. Agency, Inc.*, 11 F.3d 1380, 1382 (7th Cir. 1993) (alterations in the original) (quoting *Rickey*, 457 N.E.2d at 5)). Without satisfying these tests, plaintiffs in either category cannot recover for negligent infliction of emotional distress.

In Midway's case, analogy to the tort of negligent infliction of emotional distress does not show that emotional distress can establish standing. By analogy, under Illinois law, Midway would be a direct victim, having alleged that he was directly affected by the data breach. As such, Midway would have to satisfy the impact rule, showing that he the emotional distress he suffered accompanied a physical injury or impact to him. However, Midway has not alleged that he suffered a physical harm due to the emotional stress he suffered. Rather, Midway asserts that anxiety itself was the injury that he suffered. Anxiety itself does not constitute a physical injury. In this case, Midway would not be able to recover for negligent infliction of emotional distress. Not being able to recover is analogous to not being able to establish standing. As such, negligent infliction of emotional distress cannot show that emotional distress can establish standing.

III. Regardless of Whether the Causation and Redressability Requirements Are Met, Article III Standing Cannot be Established in this Case because There Is No Injury in Fact.

Two other requirements need to be addressed to establish Article III standing: causation and redressability. Causation is the requirement "that the injury was likely caused by the defendant" and redressability is the requirement "that the injury would likely be redressed by judicial relief." *TransUnion*, 141 S.Ct. at 2203 (citing *Lujan*, 504 U.S. at 560–61). To establish

causation, the plaintiff must "show [] that the defendant's actual action has caused the substantial risk of harm." *Remijas*, 794 F.3d at 696 (citing *Clapper*, 568 U.S. at 414 n.5). If the plaintiff can show causation, then Article III allows them to redress those harms. *See TransUnion*, 141 S.Ct. at 2205 (citing *Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329, 332 (7th Cir. 2019)). The plaintiff "must allege enough in their complaint to support" these requirements. *Remijas*, 794 F.3d at 696. However, at the pleadings stage, the court must accept all material allegations of the complaint as true, drawing all reasonable inferences in favor of the plaintiff, "unless standing is challenged as a factual matter." *Lewert*, 819 F.3d at 966 (citing *Reid L.*, 358 F.3d at 515).

In this case, Datavault is not challenging standing as a factual matter. *See* R1. Rather, that Article III standing has not been established based on the allegations Midway alleges in his complaint. *See* R1; R9. As such, all material allegations of the complaint must be accepted as true. Midway has alleged that the data breach at Datavault caused him to incur an increased risk of harm, prevention costs, and emotional distress. R9-R10. Taking these allegations to be true, the causation and redressability requirements of Article III standing have been met. However, in this case, whether the causation and redressability requirements have been met, standing has not been established. As shown above, the harms that Midway alleges do not constitute injuries in fact. As such, Midway has not met all three requirements of Article III standing and therefore, has not established Article III standing in this case.

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WRITING SAMPLE #2

I prepared the attached writing sample for my Corporate Criminal Prosecutions and Investigations class at the University of Chicago Law School. For this assignment, I was asked to write a 20–25-page paper on a topic related to the class. I chose to write my paper on the definition of "loss" under the U.S. Sentencing Guidelines. I titled my paper "*Kisor* Should Apply to "Loss" under U.S. Sentencing Guidelines: Why the Third Circuit's Interpretation of "Loss" to Exclude "Intended Loss" under U.S. Sentencing Guidelines is the Correct Interpretation". I performed all of the research and the assignment was self-edited with no comments. To create a 10-page writing sample, I omitted the introduction, a discussion of the U.S. Sentencing Guidelines, a discussion of *Kisor* and *Auer* deference, and the conclusion.

Loss under the Sentencing Guidelines

§ 2B1.1 of the Sentencing Guidelines outlines the offense level calculation for a number of white-collar offenses.[1] While the baseline offense level for these offenses is 6-7[2], the offense level can be enhanced based on the amount of loss attributed to the defendant.[3] The calculation of loss can increase a sentence up to 30 levels[4], drastically "transform[ing] a sentence from 'modest to substantial.'"[5] While there are other non-loss enhancement categories[6], the calculation of loss is "the key determinant of a white-collar criminal defendant's sentence…"[7] In determining the amount of loss that can be attributed to the defendant, it is important to understand how loss is defined under the Sentencing Guidelines.

While SB1.1 does not define "loss" directly within the guideline itself, the Sentencing Commission added commentary to the provision defining "loss."[8] The application note defines loss to be "the greater of actual loss or intended loss."[9] "Actual loss" is defined as "the reasonably foreseeable pecuniary harm that resulted from the offense."[10] "Intended loss" is defined as "(I) [] the pecuniary harm that the defendant purposely sought to inflict; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur."[11] In calculating loss, the Sentencing Guidelines describe factors courts should consider, including the fair market value of the property lost, the amount of victims multiplied by the average loss of those victims, and the extent of the crime.[12] Even with these factors, courts are only required to "make a reasonable estimate of the loss."[13] While estimating loss may be easier in cases like simple fraud, estimating loss in more complex cases, like crimes with multiple victims, may be more difficult.[14]

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[1] U.S.S.G. § 2B1.1.
[2] U.S.S.G. § 2B1.1(a).
[3] U.S.S.G. § 2B1.1(b).
[4] U.S.S.G. § 2B1.1(b)(1)(A)-(P).
[5] Derick R. Vollrath, *Losing the Loss Calculation: Toward A More Just Sentencing Regime in White-Collar Criminal Cases*, 59 Duke L.J. 1001, 1018 (2010).
[6] U.S.S.G. § 2B1.1(2)-(20).
[7] Vollrath, *supra* note 5, at 1012.
[8] U.S.S.G. § 2B1.1, cmt. n. 2(A).
[9] U.S.S.G. § 2B1.1, cmt. n. 2(A)
[10] 2U.S.S.G. § 2B1.1, cmt. n.3(A)(i).
[11] U.S.S.G. § 2B1.1, cmt. n.3(A)(ii).
[12] U.S.S.G. § 2B1.1, cmt. n3(C)(i)-(vi).
[13] U.S.S.G. § 2B1.1, cmt. n.3(C).
[14] Vollrath, *supra* note 5, at 1019.

Despite difficulties in calculating intended loss, most jurisdictions find that loss includes intended loss under the Sentencing Guidelines.[15] However, most jurisdictions found so before *Kisor*[16] was decided.[17] As such, many of these jurisdictions could have a different interpretation of "loss" under the Sentencing Guidelines given the decision in *Kisor*. While most jurisdictions have not addressed how *Kisor* affects the meaning of "loss" under § 2B1.1, the Third Circuit directly addressed this issue in *United States v. Banks*[18].

United States v. Banks

In *United States v. Banks*, Frederick Banks was indicted by a grand jury "for stalking, wire fraud, aggravated identity theft, and making false statements."[19] Banks targeted the clients of Gain Capital Group, whose clients invested funds in the foreign currency exchange market.[20] Banks opened his own Gain Capital Group accounts and made deposits into them.[21] However, these deposits were drawn from accounts without sufficient funds.[22] Banks would then try to withdraw funds from the accounts before the lack of sufficient funds could be noticed.[23] Banks, however, was unsuccessful in making withdrawals.[24] Banks did make $324,000 fraudulent deposits and attempted 70 fraudulent withdrawals equaling $264,000.[25]

Even though Gain Capital did not lose any money, Banks was convicted of wire fraud and aggravated identity theft.[26] Banks was then sentenced using the offense level computation under § 2B1.1 of the Sentencing Guidelines.[27] Because Gain Capital suffered no actual loss, the District Court used the attempted loss that Banks inflicted in its loss calculations.[28] The District Court calculated the attempted loss to be $324,000, the amount of the fraudulent deposits Banks made.[29] The District Court explained that under the

[15] *See Determination of loss caused by crime involving fraud or deceit, under United States Sentencing Guidelines § 2F1.1 (U.S.S.G.)*, 118 A.L.R. Fed. 585, § 3 (Originally published in 1994) (citing various cases where Circuit Courts have found the meaning of loss under U.S.S.G. § 2B1.1 (formally U.S.S.G. § 2F1.1) to include "intended loss")).
[16] *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019).
[17] *See Determination*, *supra* note 15, at § 3.
[18] *United States v. Banks*, 55 F.4th 246 (3d Cir. 2022)
[19] *Id.* at 251.
[20] *Id*.
[21] *Id*.
[22] *Id*.
[23] *Id*.
[24] *Id*.
[25] *Id*.
[26] *Id*. at 253.
[27] *Id*.
[28] *See id*.
[29] *Id*.

Sentencing Guidelines, "loss" includes intended loss, even if "determined to be improbable or impossible of occurrence."[30] Finding Banks' intended loss to be $324,000, the court increased Bank's offense level by 12 points, from 7 to 19.[31] Banks was sentenced to 104 months in prison and three years of supervised release.[32]

Banks then appealed his conviction.[33] Amongst many arguments on appeal, Banks argued that the loss enhancement should not have been applied to his sentence because Gain Capital suffered no actual loss.[34] The Third Circuit agreed with Banks, vacating his sentence and remanded the case for resentencing.[35]

The Third Circuit's Interpretation of "Intended Loss"

The Third Circuit began its analysis of intended loss under the Sentencing Guidelines by describing how the Sentencing Guidelines are treated by other courts.[36] Namely the guideline provisions are treated like legislative rules and the commentary is treated like interpretive rules.[37] These courts, following *Seminole Rock*[38] and *Auer*[39], defer to the Sentencing Commission's interpretation of the guidelines.[40] Unless the commentary is plainly erroneous or in conflict with the guideline provision, courts tend to adhere to them.[41]

The Third Circuit then begins to discuss the effect of *Kisor*. The Court asserts that under *Kisor*, "'a court must exhaust all the traditional tools of construction, and determine that a regulation is genuinely ambiguous"' before applying *Auer* deference.[42] Under *Kisor*, "a court must make an 'independent inquiry' into the reasonable interpretations of the regulation."[43] The Supreme Court in *Kisor* then laid out three situations when an agency's interpretation should not be given controlling deference: "(1) when an agency's interpretation is not its 'authoritative' or 'official position'; (2) when an agency's interpretation does not implicate its substantive expertise in some way; and (3) when an agency's reading does not reflect its fair and

[30] *Id*.
[31] *Id*.
[32] *Id*.
[33] *See id*. at 253.
[34] *Id*.
[35] *Id*.
[36] *Id*. at 255.
[37] *Id*.
[38] *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).
[39] *Auer v. Robbins*, 519 U.S. 452 (1997).
[40] *Banks*, 55 F.4th at 255.
[41] *See id*.
[42] *Id*. at 255-56 (internal quotations omitted).
[43] *Id*.

considered judgment but rather is a convenient litigating position, a post hoc rationalization or parroting of a federal statute."[44] The Third Circuit then referred to a prior case where the court unanimously found that *Kisor*'s cabining of *Auer* applied to the Sentencing Guidelines.[45] The Third Circuit in *United States v. Nasir* found that "'[i]f the Sentencing Commission's commentary sweeps more broadly than the plain language of the guideline it interprets, we must not reflexively defer.'"[46]

The Third Circuit then applied *Kisor* to the meaning of "loss" under § 2B.1.1 of the Sentencing Guidelines. The Court first examined the plain text of § 2B1.1.[47] The Court first recognized that the words "actual" and "intended" are not mentioned in the guideline provision itself; those words are only used in the commentary.[48] The Court found the absence of "actual" or "intended" in the guideline provision to indicate that the guideline did not include intended loss. Then, the Court examined the ordinary meaning of "loss", finding it to mean "actual loss."[49] The Court came to this conclusion by examining various dictionary definitions of "loss" from the 1993 *Webster's New International Dictionary* and the 1995 *Webster's Ninth New Collegiate Dictionary*.[50] In addition, the Court discussed other dictionary definitions of loss discussed by the Sixth Circuit in *United States v. Riccardi*.[51] While the Court did recognize that in some contexts "loss" may include both "actual" and "intended" loss, the Court found that the plain text of the guideline is unambiguous.[52] As such, the Court found that because the commentary expanded the definition of loss past the plain meaning of the text in § 2B1.1, the commentary should not be given controlling deference.[53]

Implications of the Third Circuit's Interpretation

The Third Circuit's interpretation of "loss" under § 2B1.1 of the Sentencing Guidelines has a number of implications. First, the Third Circuit's decision seems to have caused a circuit split. Many circuit courts

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[44] *Id*. (internal citations and quotations omitted).
[45] *Id*. (citing *United States v. Nasir*, 17 F.4th 459, 470-71 (3d Cir. 2021)).
[46] *Id*. (quoting *Nasir*, 17 F.4th at 472, (Bibas, J., concurring)).
[47] *Id*.
[48] *Id*. at 257.
[49] *Id*.
[50] *Id*.
[51] *Id*. at 258 (citing *United States v. Riccardi*, 989 F.3d 476, 486 (6th Cir. 2021), discussing the definition of loss under the 1992 *American Heritage Dictionary of the English Language*, the 1996 *Webster's New World College Dictionary*, and the 1989 *Oxford English Dictionary*).
[52] *See id*.
[53] *See id*.

have recognized "loss" to include "intended loss" under § 2B1.1.[54] However, many of the cases were decided before *Kisor*.[55] Even after *Kisor*, some jurisdictions continue to give the commentary discussing "loss" *Auer* deference.[56] This may indicate that some courts believe that *Kisor* does not apply to "loss" under § 2B1.1.

Next, the Third Circuit's decision in *Banks* may influence the sentencing of white-collar criminal defendants. In practice, if "loss" under § 2B1.1 of the Sentencing Guidelines does not include "intended loss", there are cases where this interpretation will lead to reduced sentences for white-collar criminal defendants.[57] In cases where there is no actual loss, actual loss is difficult to calculate, or where intended loss is greater than actual loss, the exclusion of intended loss in the loss-enhancement calculation will lead to lower offense level calculations, leading to lower sentences. In some cases, this may seem fair but in others, it may not address the moral culpability of the defendant or adequately punish or deter the defendant.

Finally, the Third Circuit's interpretation of "loss" under § 2B1.1 has implications for the Sentencing Guidelines. The Third Circuit's application of *Kisor* to the meaning of "loss" under § 2B1.1. may lead other courts to apply *Kisor* more broadly to the Sentencing Guidelines. Some courts have done similar independent examinations of guideline provisions under the Sentencing Guidelines before *Kisor* was decided.[58] However, other jurisdictions have still given the commentary controlling deference, not even mentioning Kisor. This may indicate that courts may not believe that *Kisor* applies to the Sentencing Guidelines commentary at all.

With many of the implications of *Banks* unresolved, questions remain as to whether *Kisor* should apply to the Sentencing Guidelines and whether *Kisor* should apply to the meaning of "loss" under § 2B1.1.

Why *Kisor* should apply to the Sentencing Guidelines

The question whether *Kisor* should apply to the Sentencing Guidelines begins with how the

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[54] *See Determination*, supra note 15, at § 3.
[55] *Id*.
[56] See *United States v. Vargas*, 35 F.4th 936, 940 (5th Cir.), *reh'g en banc granted, opinion vacated*, 45 F.4th 1083 (5th Cir. 2022) (citing *United States v. Lagos*, 25 F.4th 329, 335 (5th Cir. 2022); *United States v. Abrego*, 997 F.3d 309, 312–13 (5th Cir. 2021); *United States v. Longoria*, 958 F.3d 372, 377 (5th Cir. 2020)).
[57] *Third Circuit Rejects Use Of "Intended Loss" as Enhancement Under U.S. Sentencing Guidelines*, Dechert OnPoint, https://www.dechert.com/knowledge/onpoint/2022/12/third-circuit-rejects-use-of--intended-loss--as-enhancement-unde.html (Dec. 1, 2022).
[58] *See* Liam Murphy, *What's the Deference? Interpreting the U.S. Sentencing Guidelines After Kisor*, 75 Vand. L. Rev. 957, 990 (2022) (citing for example *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019) and *United States v. Winstead, 890 F.3d 1082* (D.C. Cir. 2018)).

Sentencing Guidelines are treated by the courts. Like mentioned before, traditionally, courts treat the guideline provisions like legislative rules, while the commentary is treated like interpretive rules.[59] The Administrative Procedure Act (APA) outlines the ways in which federal agencies create and issue regulations, also known as "rules."[60] Agencies are required to fulfill procedural requirements before issuing rules, including publishing notice of the proposed rule in the Federal Register and allowing comments from interested parties.[61] "Rules" are defined as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency."[62] The APA requires different procedures for two types of rules: substantive rules, also known as legislative rules, and interpretive rules. Legislative rules require notice-and-comment while interpretive rules do not.[63] Even with this difference, the APA does not define legislative and interpretive rules under the act. Instead, courts and scholars have defined the terms. The District of Columbia District Court (DC District Court) has defined legislative rules as rules that "grant rights, impose obligations, or produce other significant effects on private interests."[64] The DC District Court has also defined interpretive rules as "an agency statement interpreting an existing statute or rule."[65] Legislative rules are said to have "the force and effect of law."[66] They are binding on courts unless they are "procedurally defective, arbitrary or capricious, or manifestly contrary to the statute."[67] Interpretive rules do not[68], acting in an advisory capacity, with agencies interpreting the meaning of a statute or rule.[69]

While most courts treat the commentary of the Sentencing Guidelines as interpretive rules, their use of the commentary seems to be more like legislative rules rather than interpretive rules. Most courts treat the

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[59] *Banks*, 55 F.4th at 255 (citing *Stinson v. United States*, 508 U.S. 36, 44-45 (1993)).
[60] *Summary of the Administrative Procedure Act 5 USC §551 et seq. (1946)*, EPA, https://www.epa.gov/laws-regulations/summary-administrative-procedure-act (last updated August 15, 2022).
[61] 5 U.S.C. § 533(b)-(c).
[62] 5 U.S.C §551(4).
[63] *See* 5 U.S.C. § 533(b)(A).
[64] *Batterton v. Marshall*, 648 F.2d 694, 701-02 (D.C. Cir. 1980).
[65] *Id*. at 705 (citing *Guardian Fed. Sav. & Loan Ass'n v. Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 664 (D.C. Cir. 1978)).
[66] *Abbott Lab'ys v. United States*, 84 Fed. Cl. 96, 109 (2008), aff'd, 573 F.3d 1327 (Fed. Cir. 2009) (quoting *The Falconwood Corp. v. United States*, 422 F.3d 1339, 1351 (Fed. Cir. 2005) (internal quotations omitted)).
[67] *Id*. at 109 (citing *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) (internal quotations omitted)).
[68] *Batterton*, 648 F.2d at 705 (citing *Gibson Wine Co. v. Snyder*, 194 F.2d 329 (D.C. Cir. 1952)).
[69] *Id*. at 705.

commentary of the Sentencing Guidelines to be binding, giving great deference to the Sentencing Commission's interpretation of the guidelines in the commentary. The Sentencing Guidelines even suggest that the commentary should be binding. However, the Supreme Court in *Booker*[70] rendered the commentary of the guidelines advisory given that the mandatory implementation of the guidelines violated the Sixth Amendment.[71] Even so, courts still give great deference to the commentary citing *Stinson* and *Auer*.

Given the immense weight that courts tend to give the commentary, it seems that the commentary is acting more like the Guidelines themselves and could be argued to be acting more like a legislative rule, with the force and effect of law, rather than an interpretive rule. This is potentially problematic as the commentary of the Sentencing Guidelines does not have to go through the same procedural process as the guideline provisions. However, the Supreme Court has previously rejected this argument in *Perez v. Mortgage Bankers*[72], holding that even when *Auer* deference is given to interpretive rules, they do not have the force and effect of law[73] because they are not legally binding on private parties.[74]

Even with the above argument being precluded by Supreme Court precedent, what is at issue and what involves the application of *Kisor* are the Sentencing Guidelines guideline provisions themselves. The guideline provisions themselves are most certainly legislative rules, having gone through the notice-and-comment process. Under *Kisor*, legislative rules must be genuinely ambiguous before a court can give an agency's interpretation of the rule *Auer* deference. Courts must do an independent inquiry into whether the plain text of the guideline provision itself is genuinely ambiguous. If a court finds the plain text of the guideline provision to be genuinely ambiguous, then and only then can the court look to the commentary of the Sentencing Guidelines, giving the Sentencing Commission's interpretation *Auer* deference. Because *Kisor* directly addresses the type of rule the Sentencing Guidelines are, *Kisor* should apply to the Sentencing Guidelines. As such, courts should not be so quick to ignore the decision in *Kisor* or assume that the decision in *Kisor* does little to affect the decision in *Auer*, and by extension, the decision in

[70] *United States v. Booker*, 543 U.S. 220 (2005).
[71] Vollrath, *supra* note 5, at 1012.
[72] *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92 (2015)
[73] *Kisor*, 139 S.Ct. at 2420 (citing *Perez*, 575 U.S. at 97).
[74] *Id*. (citing *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014)).

Stinson. Instead, courts should apply the *Kisor* doctrine to the guideline provisions before invoking *Stinson*, *Seminole Rock*, or *Auer* in their decisions regarding the Sentencing Guidelines

Why the Application of *Kisor* to Loss under § 2B1.1 should result in "intended loss" being excluded from the meaning of "loss" under § 2B1.1

Given the analysis above, if the Sentencing Guidelines should be subject to application of the *Kisor* doctrine, *Kisor* should also be applied to "loss" under § 2B1.1 of the Sentencing Guidelines.

To apply *Kisor* to the meaning of "loss", an analysis of the plain meaning of the text under § 2B1.1 of the Sentencing Guidelines is required. The Third Circuit conducted this analysis by analyzing the definition of "loss" in various dictionaries.[75] Notably, the Third Circuit did not provide dictionary definitions of "loss" when the Sentencing Guidelines were created in 1987 or when the definition of intended loss under § 2B1.1 was amended in 2001 and again in 2015.[76] As such, a quick analysis of definitions during those time periods is warranted. First, the 1986 *Webster's Third New International Dictionary* defines loss as "1a: the act or fact of losing : failure to keep possession… b: the harm or privation resulting from losing or being separated from something or someone…2: a person or thing or an amount that is lost"[77] These definitions of "loss" point to a tangible aspect of loss, which is more like actual loss than intended loss. Next, the 2001 *Oxford Dictionary, Thesaurus, and Wordpower Guide* defines loss as "1 the loss of the documents… 2 loss of earnings."[78] Finally, the 2012 *Merriam-Webster's Collegiate Dictionary* defines loss as "1 : destruction ruin 2 a : the act of losing possession :deprivation [] b : the harm or privation resulting from loss or separation c : an instance of losing 3 :a person or thing or an amount that is lost: …" [79] Again, these definitions indicate a tangible aspect of loss, which is more consistent with the meaning of actual loss. In addition, in all of the above sources, there is no mention of intended loss nor an indication that intention is relevant. Even today in 2023, the *Merriam-Webster Dictionary* does not mention intended loss in any of the

[75] *Banks*, 55 F.4th at 257-258.
[76] *See* Daniel S. Guarnera, *A Fatally Flawed Proxy: The Role of "Intended Loss" in the U.S. Sentencing Guidelines for Fraud*, 81 Mo. L. Rev. 715, 737-38 (2016).
[77] LOSS, Webster's Third New International Dictionary 1338 (3d. ed. 1986).
[78] LOSS, Oxford Dictionary, Thesaurus, and Wordpower Guide 770 (1st ed. 2001).
[79] "Loss.", Merriam-Webster's Collegiate(R) Dictionary. 11th ed. Merriam-Webster, 2012. http://proxy.uchicago.edu/login?url=https://search.credoreference.com/content/entry/mwcollegiate/loss/0?institutionId=170

various definitions it provides, including the legal definitions.[80] Furthermore, one of the most popular legal dictionaries, *Black's Law Dictionary*, does not define or mention intended loss. In fact, under loss in *Black's Law Dictionary*, there is not a definition even remotely close to the Sentencing Commission's definition of intended loss. Black's Law Dictionary, however, does provide a definition of actual loss.[81] All of these definitions indicate that "intended loss" is not included in the ordinary meaning of "loss."

While these definitions only do part of the work in understanding the ordinary meaning of "loss", the surrounding text in the guideline can better explain the context of the use of the word "loss" and whether that context indicates that intended loss should be included in the definition of "loss". Under § 2B1.1, "loss" is used under § 2B1.1(b)(1): "(1) If the loss exceeded $6,500, increase the offense level as follows."[82] What follows is a table charting the increase in offense level a court should apply to a white-collar criminal based on the increased value of the monetary loss suffered.[83] The word "loss" is used three times in the guideline provision, with neither actual or intended loss being mentioned or indicated by the surrounding words. In addition, the loss-enhancement offense level table plainly states monetary values.[84] These plainly stated values give no indication about how to calculate the values or what factors to take into account to calculate those values. With the lack of context clues indicating that "intended loss" should be considered, the meaning of loss should adhere to its plain or ordinary meaning which is "actual loss." As such, "intended loss" should be excluded from the definition of "loss" under § 2B1.1 of the Sentencing Guidelines.

Separate from the application of *Kisor* to the Sentencing Guidelines, there are some practical reasons why "intended loss" should be excluded from the definition of loss under § 2B1.1 of the Sentencing Guidelines. First, the calculation of intended loss under the Sentencing Guidelines can lead to disparities in sentences. The Sentencing Guidelines do not instruct the courts on how to calculate intended loss.[85] Instead, courts are instructed to make reasonable estimates of the loss, taking some specific factors into

[80] LOSS, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/loss (last updated April 9. 2023).
[81] LOSS, Black's Law Dictionary (11th ed. 2019) (defining actual loss as "[a] loss resulting from the real and substantial destruction of insured property.").
[82] U.S.S.G. § 2B1.1(b)(1).
[83] U.S.S.G. § 2B1.1(b)(1)(A)-(P).
[84] *See e.g.,* U.S.S.G. § 2B1.1(b)(1)(A)-(P) (for example "$6,500 or less" and "More than $1,500,000").
[85] U.S.S.G. § 2B1.1.

consideration.[86] However, many courts have found calculating loss to be rather difficult, and in at least one case, determined that loss could not be calculated.[87] Without tangible formulas or guidance to calculate the loss in a case, many courts must rely on expert witnesses to calculate loss.[88] These experts predictably calculate loss to be drastically different from the opposing side.[89] With judges having to rely on experts to calculate "intended loss", offense level calculations can be drastically different for the same crime based on whether the court is more persuaded by the prosecution's or the defense's expert witness.[90] With the purpose of the Sentencing Guidelines to standardize sentences, this outcome seems to undermine that purpose.

Finally, the Sentencing Committee can amend § 2B1.1 to explicitly include both actual and intended loss. If the Sentencing Committee wants to include intended loss in the definition of loss under § 2B1.1, the Sentencing Committee should follow the APA procedural requirements to amend the Sentencing Guidelines. In addition, because many courts adhere to the commentary under § 2B1.1., it is likely that the notice-and-commentary process would proceed smoothly to amend the guideline. While some may argue that requiring the Sentencing Commission to amend § 2B1.1 to include intended loss could lead to more challenges to guideline provisions and require the Sentence Commission to amend large portions of the Sentencing Guidelines to adhere to *Kisor*, it does not follow that the Sentencing Guidelines should not be amended. The decision in *Kisor* should not be allowed to be circumvented just because there is a possibility that large portions of the Sentencing Guidelines could be called into question. If the guideline is not genuinely ambiguous, then the plain meaning should be followed. Following the plain meaning of the guideline provision allows for courts to apply the guidelines most consistently. To promote consistency among counts, the Sentencing Commission should not be able to alter the guideline's meaning with commentary after the fact, especially since the Sentencing Commission can amend the commentary without notice-and-comment at any given moment. This can lead to disparities in sentences for similar crimes, which is contrary to the Sentencing Guidelines' purpose.

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[86] U.S.S.G. § 2B1.1, cmt. n3(C)(i)-(vi); *See also* Vollrath, *supra* note 5, at 1023.
[87] *Vollrath*, *supra* note 5, at 1019-20.
[88] *Id*. at 1020.
[89] *Id*.
[90] *Id*.

Applicant Details

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BA/BS From	**The College of Wooster**
Date of BA/BS	**May 2017**
JD/LLB From	**Stanford University Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90515&yr=2011**
Date of JD/LLB	**June 10, 2021**
Class Rank	**School does not rank**
Law Review/ Journal	**Yes**
Journal(s)	**Stanford Journal of Civil Rights and Civil Liberties**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**Pennsylvania**

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 23, 2023

The Honorable Stephanie Dawkins Davis
United States Court of Appeals for the Sixth Circuit
Theodore Levin U.S. Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, Michigan 48226

Dear Judge Davis:

I am writing to apply for a 2024-25 clerkship in your chambers. I am a 2021 graduate of Stanford Law School, currently in the waning days of a two-year clerkship with District Court Judge Brett H. Ludwig of the Eastern District of Wisconsin.

Like you, Justice Thurgood Marshall is one of my legal heroes. I admire the way he and the lawyers behind the Civil Rights Movement gradually guided the law in the direction of greater racial equality, and I hope to someday litigate cases that have the same impact in the economic realm. I think a behind the scenes peek at the appellate litigation process will provide me invaluable insights that will help me to achieve that goal.

Enclosed please find my resume, transcript, and writing samples for your review.

I welcome the opportunity to discuss my qualifications further. Thank you for your time and consideration.

Sincerely,

H. Skylar Ruprecht

H. SKYLAR RUPRECHT

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Bar Admission: Pennsylvania

EDUCATION

Stanford Law School, Stanford, CA — J.D. June 2021
Honors: Gerald Gunther Prize for Outstanding Performance in Criminal Law
Journal: *Stanford Journal of Civil Rights and Civil Liberties* (Vol. 16: Senior Editor)
Activities: Shaking the Foundations; Levin Center Public Interest Mentor/Fellow; Naturalization Pro Bono Project; Stanford Election Law Project; *The Stanford Daily*

The College of Wooster, Wooster, OH — B.A., *summa cum laude*, Philosophy, May 2017
Honors: Phi Beta Kappa, Phi Sigma Tau Philosophy Honor Society, Remy Johnston Memorial Prize in Philosophy, Honors Senior Thesis, Exemplar Status Senior Thesis, Departmental Honors
Activities: Student Government Association, Teaching Apprenticeship, *The Wooster Voice*, College Radio DJ

PUBLICATIONS

- "A Sellout," *The Piker Press*, May 16, 2022
- "Plurality of Nothing," *CC&D Literary Magazine*, Volumes 327 & 328, Nov-Dec 2022

WORK EXPERIENCE

Eastern District of Wisconsin – Judge Brett H. Ludwig — Milwaukee, WI
Judicial Law Clerk — August 2021 – Present
- Managed a docket of general civil cases and worked two trials.
- Drafted over 100 orders deciding motions to dismiss, motions to remand, motions for judgment on the pleadings, motions for class certification, motions for summary judgment, motions to suppress, petitions for writs of habeas corpus, Social Security appeals, and motions for attorney's fees.
- Researched law and prepared bench memos prior to motions hearings and oral arguments.

Office of the Federal Public Defender for the Eastern District of Virginia — Alexandria, VA
Legal Intern — June – August 2020
- Assisted the Office in its push to win compassionate release for indigent prisoners during the Covid-19 pandemic.
- Performed legal research and prepared memoranda on a wide range of criminal matters.

San José Mayor's Office — San José, CA
Policy Researcher—Stanford Design School and Policy Lab — September 2019 – May 2020
- Partnered with stakeholders to develop a comprehensive plan to increase the construction of Accessory Dwelling Units (ADUs) as a way to combat the city's affordable housing crisis.
- Surveyed members of the community to determine the biggest obstacles to ADU construction.
- Made a final policy proposal before local leaders.

Interests: Songwriting, weightlifting, road trips

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Law Unofficial Transcript

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Print Date: 02/02/2022

--------- Stanford Degrees Awarded ---------

Degree : Doctor of Jurisprudence
Confer Date : 06/13/2021
Plan : Law

--------- Academic Program ---------

Program : Law JD
09/24/2018 : Law (JD)
Plan
Status Completed Program

--------- Beginning of Academic Record ---------

2018-2019 Autumn

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	201	CIVIL PROCEDURE I	4.00	4.00	P	
Instructor:		Spaulding, Norman W.				
LAW	205	CONTRACTS	4.00	4.00	P	
Instructor:		Morantz, Alison				
LAW	207	CRIMINAL LAW	4.00	4.00	H	
Instructor:		Mills, David W				
Transcript Note:		Gerald Gunther Prize for Outstanding Performance				
LAW	219	LEGAL RESEARCH AND WRITING	2.00	2.00	P	
Instructor:		Alexander, Yonina				
LAW	223	TORTS	4.00	4.00	H	
Instructor:		Karlan, Pamela S				

LAW TERM UNTS: 18.00 LAW CUM UNTS: 18.00

2018-2019 Winter

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	203	CONSTITUTIONAL LAW	3.00	3.00	P	
Instructor:		McConnell, Michael				
LAW	217	PROPERTY	4.00	4.00	P	
Instructor:		Anderson, Michelle W				
LAW	224A	FEDERAL LITIGATION IN A GLOBAL CONTEXT: COURSEWORK	2.00	2.00	P	
Instructor:		Dearborn, Meredith R				
LAW	2009	WHITE COLLAR CRIME	3.00	3.00	H	
Instructor:		Mills, David W				

LAW TERM UNTS: 12.00 LAW CUM UNTS: 30.00

2018-2019 Spring

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	224B	FEDERAL LITIGATION IN A GLOBAL CONTEXT: METHODS AND PRACTICE	2.00	2.00	P	
Instructor:		Dearborn, Meredith R				
LAW	7010	CONSTITUTIONAL LAW: THE FOURTEENTH AMENDMENT	3.00	3.00	H	
Instructor:		Schacter, Jane				
LAW	7084	THE FIRST AMENDMENT: FREEDOM OF SPEECH AND PRESS	3.00	3.00	P	
Instructor:		Persily, Nathaniel A.				
LAW	7086	TRANSITIONAL JUSTICE	3.00	3.00	H	
Instructor:		O'Connell, James				

LAW TERM UNTS: 11.00 LAW CUM UNTS: 41.00

2019-2020 Autumn

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	806Y	POLICY PRACTICUM: JUSTICE BY DESIGN: EVICTION	4.00	4.00	P	
Instructor:		Hagan, Margaret Darin Rhode, Deborah L Solomon, Jason M				
LAW	2403	FEDERAL COURTS	3.00	3.00	P	
Instructor:		Huq, Aziz Z.				
LAW	7051	LOCAL GOVERNMENT LAW	3.00	3.00	P	
Instructor:		Ford, Richard				
LAW	7846	ELEMENTS OF POLICY ANALYSIS	1.00	1.00	MP	
Instructor:		Herman, Luciana Louise				

LAW TERM UNTS: 11.00 LAW CUM UNTS: 52.00

2019-2020 Winter

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	806Y	POLICY PRACTICUM: JUSTICE BY DESIGN: EVICTION	4.00	4.00	H	
Instructor:		Hagan, Margaret Darin Rhode, Deborah L Solomon, Jason M				
LAW	2013	UNITED STATES V. MILKEN: A CASE STUDY	2.00	2.00	H	
Instructor:		Mills, David W				
LAW	7059	LABOR LAW	3.00	3.00	MPH	
Instructor:		Gould IV, William B				
LAW	7078	THE UNITED STATES SENATE AS A LEGAL INSTITUTION	3.00	3.00	MPH	
Instructor:		Feingold, Russell				

Worksheet - For office use by authorized Stanford personnel Effective Autumn Quarter 2009-10, units earned in the Stanford Law School are quarter units. Units earned in the Stanford Law School prior to 2009-10 were semester units. Law Term and Law Cum totals are law course units earned Autumn Quarter 2009-10 and thereafter.

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Law Unofficial Transcript

Name : Ruprecht,Harrison S
Student ID : 06318681

LAW TERM UNTS: 12.00 LAW CUM UNTS: 64.00

2019-2020 Spring

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	1003	BANKRUPTCY	3.00	3.00	MPH	
Instructor:		Triantis, George Gregory				
LAW	2001	CRIMINAL PROCEDURE: ADJUDICATION	4.00	4.00	MPH	
Instructor:		Weisberg, Robert				
LAW	2402	EVIDENCE	4.00	4.00	MPH	
Instructor:		Sklansky, David A				

LAW TERM UNTS: 11.00 LAW CUM UNTS: 75.00

2020-2021 Autumn

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	2002	CRIMINAL PROCEDURE: INVESTIGATION	4.00	4.00	P	
Instructor:		Weisberg, Robert				
LAW	5805	ANIMAL LAW	2.00	2.00	H	
Instructor:		Wagman, Bruce				
LAW	6001	LEGAL ETHICS	3.00	3.00	P	
Instructor:		Rhode, Deborah L				
LAW	7038	REMEDIES	3.00	3.00	P	
Instructor:		Lemley, Mark Alan				

LAW TERM UNTS: 12.00 LAW CUM UNTS: 87.00

2020-2021 Winter

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	2401	ADVANCED CIVIL PROCEDURE	3.00	3.00	P	
Instructor:		Zambrano, Diego Alberto				
LAW	7001	ADMINISTRATIVE LAW	4.00	4.00	P	
Instructor:		Freeman Engstrom, David				
LAW	7849	MEDIATION BOOT CAMP	1.00	1.00	MP	
Instructor:		Dickstein, Michael E.				
PHIL	175W	PHILOSOPHY OF LAW: PROTEST, PUNISHMENT, AND RACIAL JUSTICE	4.00	4.00	CR	
Instructor:		Salkin, Wendy Suzanne				

LAW TERM UNTS: 8.00 LAW CUM UNTS: 95.00

2020-2021 Spring

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	1001	ANTITRUST	4.00	4.00	P	
Instructor:		Van Schewick, Barbara				
LAW	3511	WRITING WORKSHOP: LAW AND CREATIVITY	3.00	3.00	H	
Instructor:		Canales, Viola Irene				
LAW	5014	INTERNATIONAL TRADE LAW	3.00	3.00	P	
Instructor:		Sykes, Alan				
LAW	6005	TECHNOLOGICAL, ECONOMIC AND BUSINESS FORCES TRANSFORMING THE PRIVATE PRACTICE OF LAW	2.00	2.00	H	
Instructor:		Yoon, James Chung-Yul				

LAW TERM UNTS: 12.00 LAW CUM UNTS: 107.00

END OF TRANSCRIPT

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Stanford Law School's Grading System

In the fall of 2008, Stanford Law School adopted the following grading system for all courses:

H	Honors	Exceptional work, significantly superior to the average performance at the school
P	Pass	Representing successful mastery of the course material
MP	Mandatory Pass	Representing P or better work. (No Honors grades are available for Mandatory P classes.)
MPH	Mandatory Pass - Public Health Emergency*	Representing P or better work. (No Honors grades are available for Mandatory P classes.)
R	Restricted Credit	Representing work that is unsatisfactory
F	Fail	Representing work that does not show minimally adequate mastery of the material
L	Pass	Student has passed the class. Exact grade yet to be reported
I	Incomplete	
N	Continuing Course	
[blank]		Grading Deadline has not yet passed. Grade has yet to be reported.
GNR	Grade Not Reported	Grading Deadline has passed. Grade has yet to be reported.

In addition to the above grades, professors may award class prizes to recognize extraordinary performance in a particular course. These prizes are rare. No more than one prize may be awarded for every 15 students enrolled in the course. Outside of first-year required courses, awarding these prizes is at the discretion of the instructor. The five prizes, which will be noted on student transcripts, are:

- the Gerald Gunther Prize for first-year Legal Research & Writing,
- the Gerald Gunther Prize for exam classes,
- the John Hart Ely Prize for paper classes,
- the Hilmer Oehlmann, Jr Award for Federal Litigation or Federal Litigation in a Global Context, and
- the Judge Thelton E. Henderson Prize for clinical courses.

Interpreting Stanford's Grades:
Grading policies vary significantly from school to school. Other schools that have a similar system impose no limits on the number of Honors grades awarded. As a result, one might see 70-80% of a class receiving Honors. Stanford Law School, by comparison, imposes strict limitations on the percentage of Honors grades that professors may award. These vary slightly depending on the class, but employers should expect to see approximately one-third of our students receiving Honors in any exam class. For this reason, we strongly encourage employers who use grades as part of their hiring criteria to set standards specifically for Stanford students, and to consider grades in the context of other information about a candidate, such as faculty recommendations, pre-law school academic and professional experience, law school activities, and an interviewer's own impressions of the individual.

* The coronavirus outbreak caused substantial disruptions to academic life beginning in mid-March 2020, during the Winter Quarter exam period. Due to these circumstances, SLS used a Mandatory Pass-Public Health Emergency/Restricted Credit/Fail grading scale for all exam classes held during Winter Quarter 2020 and all classes held during Spring Quarter 2020.

For non-exam classes held during Winter Quarter (e.g., policy practicums, clinics, and paper classes), students could elect to receive grades on the normal H/P/Restricted Credit/Fail scale or the Mandatory Pass-Public Health Emergency/Restricted Credit/Fail scale.

Updated May 2020

David W. Mills
Professor of the Practice of Law
Senior Lecturer in Law
559 Nathan Abbott Way
Stanford, California 94305-8610
650-723-3842
dmills@dmills.com

June 23, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I am writing this letter in support of Skylar Ruprecht's application for a clerkship in your chambers. I got to know Skylar when he was a student in my Criminal Law, White Collar Crime, and U.S. v. Milken courses. During our interactions, I was most impressed with his writing ability and intellectual curiosity, and I am confident that he will be an excellent law clerk and a terrific attorney. I can fairly say that in these rather odd times, Skylar proved himself to be someone with an uncanny sense of getting to the real issues coupled with the courage of thought that is often lacking these days.

In 1L Criminal Law, Skylar distinguished himself as a uniquely inquisitive participant in class discussion. He frequently raised thought-provoking issues and helped push the discourse in a deeper and more enlightening direction. His final exam merely confirmed what his class participation suggested—that he had a strong ability to synthesize and apply the law and a knack for finding creative solutions to difficult legal dilemmas. He answered all questions thoroughly with clear and concise prose and ended up winning the class prize as having written one of the best final exam papers in the class. He continued to demonstrate very strong intellectual and personal abilities in my White Collar and US v Milken classes. I have no doubts about his intellectual capabilities or capacity to creatively navigate complex legal doctrines.

In addition, Skylar was always eager to voice his opinion and engage in respectful debate. Early on in his 1L year we had a particularly interesting conversation about whether Immanuel Kant's belief in retributive justice appropriately reflected Kantian moral philosophy. From this conversation, I learned that Skylar was someone who enjoyed hearing opposing viewpoints and took criticism as a means for improving his own arguments. This is just one example of many that I can recall, in which Skylar demonstrated fearless but thoughtful intellectual curiosity coupled with a willingness to hold his ground where appropriate. I think this skill will serve him especially well during a judicial clerkship. I really have treasured my time with Skylar and was sorry to see him leave as his leaving is a serious loss to the Law School community.

In short, I give my full recommendation to Skylar without reservation. He always brought a strong work ethic and unique perspective to class, and he will bring the same to your chambers. Please feel free to contact me with any further questions.

Sincerely,

/s/ David W. Mills

Margaret Hagan
Director, Legal Design Lab
Lecturer in Law
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610
Tel 650 498.1392
mdhagan@stanford.edu

June 23, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I would like to recommend Harrison Skylar Ruprecht for a clerkship. I have had the privilege to have worked with him as a teacher and supervisor during the past school year. I have been extremely impressed with his commitment to detailed legal research, creative problem-solving, and engagement with complex public policy issues.

At Stanford, I direct the Legal Design Lab, in which students, researchers, and technologists collaborate to research key needs within the civil justice system, and to develop new services and technologies that could improve court efficiency and litigants' ability to navigate the system. Skylar has been my student for the past 6 months, as part of the Law School policy lab class on Justice By Design: Evictions.

In the class, he worked on a two-person team that focused on possible eviction prevention policies in the Bay Area. He was given a broad mandate from our partner at the Judicial Council, to explore possible policy areas around eviction, and then Skylar and his team-mate conducted user research with tenants and landlords, along with legal and policy research, to focus on a particular policy challenge that the city of San Jose was considering around encouraging more homeowners to offer accessory dwelling units to the rental market.

Skylar has stood out as one of the top students in my class this year – quickly taking on a leadership role in the class environment and the project work. He brings an enormous amount of energy and insight to work on access to justice and empirical legal research. In the class, he helped build a partnership with the San Jose's mayor's office, develop an extensive survey on housing policy issues, and write an analysis and visual presentation of this survey for use by city leaders.

In the class, he showed his thoughtfulness, critical thinking, and constructive team relationships. He worked well with the mix of law students, policy students, engineering students, and others. Skylar thinks at the systems level, with understanding of complexities of how law and policy might interact, as well as paying close attention to details and texts. He was great to work with in class, with frequent and meaningful contributions to our conversations, and with good relationships with his peers in their many group project tasks.

His writing and presentation skills are very effective. The report that he wrote with his team-mate for the mayor's office was clear, detailed, and succinct. They also made a visual presentation to convey their findings with graphs, diagrams, and other visual techniques. Both the report and presentation were received very well by the partner groups, and they have been used in the city's policy-making work.

Skylar is intelligent, creative, and critical, with very strong leadership skills combined with good team and project management skills. He is hard-working and enjoyable to work with. His talents will make him an excellent law clerk, and I would recommend him strongly and without any reservation for a position in your office.

Please be in touch if there is any other way I can be helpful. You can call me directly at (650) 498-1392, or write at mdhagan@stanford.edu. Thank you for your attention!

Sincerely,

/s/ Margaret Hagan
Director, Stanford Legal Design Lab

StanfordLawSchool

JENNY S. MARTINEZ
Richard E. Lang Professor of Law and Dean

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jmartinez@law.stanford.edu

Stanford Grading System

Dear Judge:

Since 2008, Stanford Law School has followed the non-numerical grading system set forth below. The system establishes "Pass" (P) as the default grade for typically strong work in which the student has mastered the subject, and "Honors" (H) as the grade for exceptional work. As explained further below, H grades were limited by a strict curve.

H	Honors	Exceptional work, significantly superior to the average performance at the school.
P	Pass	Representing successful mastery of the course material.
MP	Mandatory Pass	Representing P or better work. (No Honors grades are available for Mandatory P classes.)
MPH	Mandatory Pass - Public Health Emergency*	Representing P or better work. (No Honors grades are available for Mandatory P classes.)
R	Restricted Credit	Representing work that is unsatisfactory.
F	Fail	Representing work that does not show minimally adequate mastery of the material.
L	Pass	Student has passed the class. Exact grade yet to be reported.
I	Incomplete	
N	Continuing Course	
[blank]		Grading deadline has not yet passed. Grade has yet to be reported.
GNR	Grade Not Reported	Grading deadline has passed. Grade has yet to be reported.

In addition to Hs and Ps, we also award a limited number of class prizes to recognize truly extraordinary performance. These prizes are rare: No more than one prize can be awarded for every 15 students enrolled in a course. Outside of first-year required courses, awarding these prizes is at the discretion of the instructor.

* The coronavirus outbreak caused substantial disruptions to academic life beginning in mid-March 2020, during the Winter Quarter exam period. Due to these circumstances, SLS used a Mandatory Pass-Public Health Emergency/Restricted Credit/Fail grading scale for all exam classes held during Winter 2020 and all classes held during Spring 2020.

For non-exam classes held during Winter Quarter (e.g., policy practicums, clinics, and paper classes), students could elect to receive grades on the normal H/P/Restricted Credit/Fail scale or the Mandatory Pass-Public Health Emergency/Restricted Credit/Fail scale.

The five prizes, which will be noted on student transcripts, are:

- the Gerald Gunther Prize for first-year legal research and writing,
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- the John Hart Ely Prize for paper classes,
- the Hilmer Oehlmann, Jr. Award for Federal Litigation or Federal Litigation in a Global Context, and
- the Judge Thelton E. Henderson Prize for clinical courses.

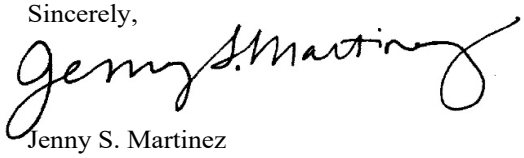
Unlike some of our peer schools, Stanford strictly limits the percentage of Hs that professors may award. Given these strict caps, in many years, *no student* graduates with all Hs, while only one or two students, at most, will compile an all-H record throughout just the first year of study. Furthermore, only 10 percent of students will compile a record of three-quarters Hs; compiling such a record, therefore, puts a student firmly within the top 10 percent of his or her law school class.

Some schools that have similar H/P grading systems do not impose limits on the number of Hs that can be awarded. At such schools, it is not uncommon for over 70 or 80 percent of a class to receive Hs, and many students graduate with all-H transcripts. This is not the case at Stanford Law. Accordingly, if you use grades as part of your hiring criteria, we strongly urge you to set standards specifically for Stanford Law School students.

If you have questions or would like further information about our grading system, please contact Professor Michelle Anderson, Chair of the Clerkship Committee, at (650) 498-1149 or manderson@law.stanford.edu. We appreciate your interest in our students, and we are eager to help you in any way we can.

Thank you for your consideration.

Sincerely,



Jenny S. Martinez
Richard E. Lang Professor of Law and Dean

Updated May 2020

My name is Brett Ludwig, and I am a District Judge serving in the Eastern District of Wisconsin in Milwaukee. I am writing to recommend – **as highly as I can** – one of my current law clerks, Skylar Ruprecht, for a clerkship in your chambers. Skylar is a gifted young lawyer and the best law clerk I have ever had the good fortune to employ. In fact, his analytical and writing skills are the best I have seen in a young lawyer in my entire career, including more than two decades of private practice experience at a large law firm and seven years' service as a federal judge.

Skylar has the key attributes of a great law clerk: top-notch intellect, outstanding writing skills, and a great work ethic. His intelligence is reflected on his resume (*summa cum laude,* Phi Beta Kappa, Stanford Law School, etc.), but I can confirm he has practical and not just paper smarts. He also has a rare but wonderful intellectual curiosity about the law and has become my "go-to" law clerk for particularly difficult issues. Skylar is also a tremendously gifted writer. His draft decisions are clear and concise, well-beyond the level usually associated with a young lawyer. Perhaps most impressive is Skylar's productivity. In just over a year and a half in my chambers, he has helped draft more than *one hundred* substantive decisions. He has a real gift for quickly digesting briefs, sifting out the material issues, and producing a concise, high-quality first draft. He has been invaluable to me in working through a morass of old motions and cases that were reassigned to me when I took the bench.

Skylar is also a good person. While devoted to completing his assigned tasks promptly, he is a joy to have in chambers. His witty takes on our cases, current events, and daily chambers life are appreciated by my entire team, including my courtroom deputy and his co-clerks.

Skylar's immense talents and tremendous productivity have been apparent since he started with me in August 2021. At my urging, he is now considering appellate court clerkships. If you have any law clerk openings, you should hire Skylar. You will not regret it. In fact, he may be the best law clerk you ever hire.

If you have any questions, please call me at 414-297-3076.

Yours very truly,

BHL

H. Skylar Ruprecht

(412) 496-9022 • 161 W. Wisconsin Ave., Apt. 315 Milwaukee, WI 53203 • skylar_ruprecht@wied.uscourts.gov

The attached writing sample is a draft of a summary judgment order I prepared while clerking for Judge Brett H. Ludwig. While the final product is substantially similar, this draft represents solely my work, without input from anyone else. I received permission from Judge Ludwig to use this piece as a writing sample.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

TIMOTHY RIKKERS,

Plaintiff,

Case No. 17-cv-1208-bhl

v.

MENARD INC,

Defendant.

ORDER GRANTING SUMMARY JUDGMENT

What we have here is a math problem masquerading as a lawsuit. Experts have weighed in, numbers have been crunched, and Plaintiff Timothy Rikkers has reached a disturbing conclusion: Menards' celebrated "11% Rebate Sales" offer an effective rebate rate of only 9.59%. Consumers have not suffered such a comparably sharp sting of betrayal since 2013, when an Australian teen measured his Subway footlong and discovered that it was only 11 inches long. *See In re Subway Footlong Sandwich Mktg. and Sales Practices Litig.*, 869 F.3 551, 552 (7th Cir. 2017). As with the plaintiffs in *Subway*, Rikkers seeks to certify a class of defrauded customers. Defendant, Menard, Inc., rejects allegations of impropriety and moves for summary judgment. Because the term "rebate" contemplates Defendant's practices, the motion will be granted.

FACTUAL BACKGROUND[1]

Menards is a Wisconsin home improvement company headquartered in Eau Claire. (ECF No. 74 at 1.) It operates over 300 stores in 14 states across the Midwest. (*Id.*) Since 2011, the company has regularly run an "11% Rebate Sales" program. (*Id.* at 2.) During applicable periods, customers can claim an 11% rebate on their purchases by filling out a rebate form, mailing the form to an Elk Mound P.O. Box appropriately named "Save 11%", and waiting to receive an in-store "credit check." (ECF No. 1 at 8 & ECF No. 74 at 10.)

[1] These facts are drawn from the parties' proposed statements of undisputed facts (and responses). (ECF Nos. 74, & 84 at 3-4) as well as the Complaint. (ECF No. 1.) Disputed facts are viewed in the light most favorable to the non-moving party.

On August 21, 2017, Timothy Rikkers heard a Menards' radio advertisement promoting an active 11% rebate sale. (ECF No. 84 at 3.) Remembering that he needed to buy exterior lights for his girlfriend's rental property, Rikkers decided to take advantage of the rebate and visited Menards' Madison West store. (*Id.*) At some point before he completed his transaction, Rikkers learned that the rebate required him to mail in a form and wait six to eight weeks for his credit check. (*Id.* at 4.)

After making his purchases, Rikkers received a rebate receipt setting forth the value of his rebate—$21.32—which represented 11% of the total sale price of his purchases ($193.82), before taxes. (*Id.*) Later that same day, Rikkers filled out a rebate form and mailed it to Menards. (*Id.*) Less than four weeks later, on September 15, 2017, Menards issued Rikkers a merchandise credit check good for $21.32. (*Id.*) The check had no expiration date and could be used for in-store purchases at any time. (*Id.*)

SUMMARY JUDGMENT STANDARD

"Summary Judgment is appropriate where the admissible evidence reveals no genuine issue of any material fact." *Sweatt v. Union Pac. R. Co.*, 796 F.3d 701, 707 (7th Cir. 2015) (citing Fed. R. Civ. P. 56(c)). Material facts are those under the applicable substantive law that "might affect the outcome of the suit." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of "material fact is 'genuine' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* If the parties assert different views of the facts, the Court must view the record in the light most favorable to the nonmoving party. *E.E.O.C. v. Sears, Roebuck & Co.*, 233 F.3d 432, 437 (7th Cir. 2000).

ANALYSIS

Considering tax damages, postage cost damages, and rebate time value damages, Plaintiff alleges he and putative class members received a 9.59% rebate rather than the promised 11%. Thus, he claims Menards is liable for: (1) untrue, deceptive, and misleading statements in violation of Wis. Stat. §§100.8(1) and (9)(a); (2) insufficient commercial disclosure in violation of Wis. Stat. §100.195(2); (3) unjust enrichment; (4) intentional and strict responsibility misrepresentation; and (5) illegal price comparisons in violation of ATCP §124.03(1) and Wis. Stat. §100.20(2)(a).

Plaintiff asserts that his case hinges on "[w]hether Menards ever discloses the rebate isn't really 11%". (ECF No. 73 at 3.) If it does, the case fails. If it does not, Menards' fate lies with

the jury. But this clever framing surreptitiously resolves a central question of law in Plaintiff's favor with a flick of the wrist. Lurking in the noumenal space beyond Plaintiff's proposed fulcrum of the case is an advantageously narrow definition of "rebate." That is, Plaintiff presupposes that "rebates" do not and cannot incorporate losses from taxes, postage, and time value. While he may wish Menards had conceded this point, he is not free to concede it for them. Indeed, because the Court understands "rebate" to contemplate Defendant's mail-in program, Plaintiff fails to demonstrate pecuniary loss, and summary judgment must be granted.

I. Plaintiff's Expert Determined Menards' Rebates Had an Effective Rate of Only 9.59%, Not the 11% Represented in Advertisements.

Plaintiff's expert, Dr. Frank Bernatowicz, contends that Menards' 11% rebate calculation "fails to recognize and account for three areas of actual pecuniary damages: (1) Additional Tax Damages; (2) Postage Cost Damages; and (3) Rebate Time Value Damages." (ECF No. 38 at 10.) According to Dr. Bernatowicz:

> Additional Tax Damages logically represent the additional state and local taxes paid by the consumer at the time of purchase under a Menards 11% Rebate Sale (whereby rebate issuance occurs later in time), compared to the amount of state and local taxes that would have been paid by the consumer at the time of purchase where the rebate amount is applied at the time of the corresponding purchase. Postage Cost Damages logically represent the postage cost per rebate transaction, or the price of the stamp(s) required to mail in the rebate form and rebate receipt under a Menards 11% Rebate Sale, compared to not having to incur the postage costs where the rebate amount is applied at the time of purchase. Rebate Time Value Damages logically represents the concept that the rebate benefit available at the time of purchase is worth more than an identical sum in the future (six-to-eight weeks processing allowance per Menards) due to its potential earning (interest) capacity. (*Id.* at 10-11.)

Accounting for these three areas of damages, Dr. Bernatowicz's "analysis shows an ***Effective Rebate amount of 9.59%*** and not the 11% as advertised by Menards[.]" (*Id.* at 11) (emphasis in original).

The data is helpfully provided in neatly constructed exhibits, and the math checks out. *See id.* at 21-38.) But the Court's jurisprudential duty requires more than a simple review of arithmetic. Indeed, Dr. Bernatowicz's numbers rely on Rikkers' preferred definition of "rebate," so they are only as valuable as that definition is precise.

II. The Term "Rebate" Anticipates Defendant's Program.

Black's Law Dictionary defines a "rebate" as "1. A return of part of a payment, serving as a discount or reduction. 2. An amount of money that is paid back when someone has overpaid."

Rebate, BLACK'S LAW DICTIONARY (11th ed. 2019). Similarly, Merriam-Webster defines "rebate" as "a return of a part of a payment." *Rebate*, Merriam-Webster, https://www.merriam-webster.com/dictionary/rebate (last visited Nov. 1, 2021). Notably absent from these definitions is talk of tax consequences, postage, or accumulated interest. In short, "rebate" is a general term that encompasses more than point of sale refunds. Definitionally, then, an 11% point of sale rebate and an 11% mail-in rebate are both properly cast as returning 11% of a payment, even if the latter is functionally worth less because of extraneous expenses.

It may be helpful to liken a mail-in rebate to the distance of a punt. A punt that travels 50 yards in the air and is returned 10 yards by the opposing team could be called a 50-yard punt or a 40-yard punt. If one inquires about the punt's distance, either answer (50 or 40 yards) is legitimate. Neither misleads or defrauds the inquisitor. So it is with mail-in rebates. Menards could advertise 11% rebate sales, or it could advertise 9.59% rebate sales. Though one is more aesthetically-pleasing, neither is fraudulent.

The Federal Trade Commission (FTC) agrees with this assessment. "[M]ost rebates are of the mail-in variety. They require consumers to pay the full cost of an item at the time [sic] purchase, then to send documentation to the manufacturer or retailer to receive a rebate by mail." (ECF No. 46, Ex. P.) This means most rebates, whether they be for 5 or 50 percent, are functionally worth slightly less than stated because of peripheral expenses. Yet none of them is subject to liability for that reason alone.

In sum, because "rebate" anticipates and incorporates the external fees associated with a mail-in program, Dr. Bernatowicz's 9.59% effective rate does not represent a fraudulent return on an 11% rebate promise.

III. All of Plaintiff's Claims Require Proof of Pecuniary Loss. Because He Cannot Show Such Loss, All Claims Must be Dismissed.

All of Rikkers' claims require proof of pecuniary loss. *See K&S Tool & Die Corp. v. Perfection Machinery Sales, Inc.*, 732 N.W.2d 792, 802 (Wis. 2007) (finding that the Wis. Stat. §100.18 "requires a causal connection between the untrue, deceptive, or misleading representation and the pecuniary loss"); Wis. Stat. Ann. § 100.195 ("Any person suffering pecuniary loss because of a violation of this section may commence an action to recover the pecuniary loss"); *Loeb v. Champion Petfoods USA, Inc.*, 359 F.Supp.3d 597, 605 (dismissing unjust enrichment claim for failure to raise facts capable of establishing inequity); *Tietsworth v. Harley-Davidson, Inc.*, 677 N.W.2d 233, 239 (Wis. 2004) (holding that all misrepresentation claims require the plaintiff to

have "believed and relied on the misrepresentation to his detriment or damage"); Wis. Stat. Ann. § 100.20[2] ("Any person suffering pecuniary loss because of a violation by any other person of s. 100.70 or any order issued under this section may sue for damages").

In this case, Rikkers got exactly what he bargained for. It is undisputed that before he completed his transaction, he knew exactly how Menards' rebate program worked. (ECF No. 84 at 4.) He purchased $193.82 worth of goods. (*Id.*) 11% of $193.82 is $21.32, which is the exact amount awarded on his credit check. (*Id.*) That he incurred incidental expenses in the process of receiving his $21.32 is immaterial. Those expenses are built in to the definition of "rebate," and their existence cannot be used to demonstrate fraud. Nothing else on the record indicates pecuniary loss. As a result, all of Rikkers' claims must fail.

CONCLUSION

Plaintiff asks the Court to construe "rebate" in a way that would render mail-in rebate programs (the most popular kind of rebate) fraudulent. But given the choice between invalidating most of America's existing rebate programs from the second floor of a Milwaukee courthouse or reading "rebate" to include the notion of mail-in arrangements, we opt for the latter.

Accordingly,

IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment under Fed. R. Civ. P. 56 (ECF No. 60) is GRANTED, and the case is DISMISSED.

Dated at Milwaukee, Wisconsin on February 24, 2023.

s/ *Brett H. Ludwig*
BRETT H. LUDWIG
United States District Judge

[2] Plaintiff's "price comparison claims" are further barred because they first appeared in his response to Defendant's motion for summary judgment. The complaint, not a motion, was the proper place to raise such claims. *See Shanahan v. City of Chicago*, 82 F.3d 776, 781 (7th Cir. 1996).

H. SKYLAR RUPRECHT
(412) 496-9022 • 161 W. Wisconsin Ave, Apt 315, Milwaukee, WI 53203 • skylar_ruprecht@wied.uscourts.gov

The attached writing sample is a summary judgment order I drafted while clerking for Judge Brett H. Ludwig in the Eastern District of Wisconsin. I received permission from Judge Ludwig to use this order as a writing sample. This piece is almost entirely my own work, with a few edits adopted prior to docketing.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ANDREW L COLBORN,

Plaintiff,

Case No. 19-cv-0484-bhl

v.

NETFLIX INC, et al.,

Defendants.

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

On December 18, 2015, Netflix released the ten-part docuseries *Making a Murderer* and turned small-town sergeant Andrew Colborn into a household name. He now very much wishes it had not. His unflattering portrayal in the series transformed his "15 minutes of fame" into what felt like a far longer period of *infamy*, as a mob of outraged viewers flooded his voicemail and email inboxes with vile and hostile messages. Some called him a crooked cop. Others wished him a long, unpleasant stay in fiery perdition. At least one person threatened to harm his family. Meanwhile, two thousand miles away, *Making a Murderer*'s producers were basking in accolades and consorting with major media outlets. Critics lauded their journalistic tenacity and unique ability to synthesize the legal and dramatic.[1] Colborn received no such flattery—as the producers took the stage at the Microsoft Theatre to accept their Emmys, he was busy boarding up the front door to his own house. Outraged by what he believed to be grossly unjust, inverted life trajectories, Colborn filed this lawsuit, accusing Netflix, Inc., Chrome Media LLC, and producers Laura Ricciardi and Moira Demos of defamation. All Defendants have moved for summary judgment. Colborn has also moved for partial summary judgment on 52 allegedly defamatory statements. The dispositive question is whether Colborn has produced sufficient evidence to make a defamation case out of his admittedly harsh portrayal. He has not. The First Amendment does not

[1] Mike Hale, *Review: 'Making a Murderer,' True Crime on Netflix*, N.Y. Times, (Dec. 16, 2015), https://www.nytimes.com/2015/12/17/arts/television/review-making-a-murderer-true-crime-on-netflix.html?_r=0; Margaret Lyons, Making a Murderer *Is As Good As 'Serial' and* The Jinx*, If Not Better*, Vulture, (Dec. 17, 2015), https://www.vulture.com/2015/12/making-a-murderer-as-good-as-serial-if-not-better.html.

guarantee a public figure like Colborn the role of protagonist in popular discourse—in fact, it protects the media's ability to cast him in a much less flattering light—so Defendants are entitled to summary judgment on all counts.

FACTUAL BACKGROUND

Making a Murderer attempts to condense the tumultuous life of convicted murderer Steven Avery into roughly ten hours of narratively satisfying television. The series opens in 1985, when police arrested Avery, then only 23 years old but already well-acquainted with the criminal justice system, and charged him with the attempted murder, sexual assault, and false imprisonment of Penny Beerntsen. (ECF No. 326 at 1-2.) Though he professed his innocence, a jury accepted Beerntsen's eyewitness testimony and convicted Avery on all counts, and a judge sentenced him to 60 years in prison. (*Id.* at 2-3.)

About 10 years later, in 1994 or 1995, Andrew Colborn, a Manitowoc County Jail Corrections Officer, fielded a phone call from a detective in another jurisdiction. (*Id.* at 3.) The detective relayed that an inmate in the nearby Brown County jail had claimed responsibility for a sexual assault that Manitowoc County had ascribed to someone else. (*Id.*) Colborn transferred the call to the Detective Division and, consistent with his own limited position, took no further action. (ECF No. 346-1 at 24.) Other members of law enforcement would later testify that then-Manitowoc County Sheriff Tom Kocourek assured Colborn that authorities had "the right guy." (ECF No. 326 at 5.)

If the call Colborn received was indeed about Steven Avery, which seems likely but is not established, the Sheriff's assurances were utterly misplaced. Manitowoc County did not, in fact, have the right guy. In 2002, using DNA evidence, attorneys for the Wisconsin Innocence Project proved that Gregory Allen, not Avery, was the one behind Beerntsen's violent assault. (*Id.* at 3.) Thus, on September 11, 2003, 18 years after he was wrongfully convicted, Avery walked free. (*Id.*)

One day later, at his superior's request, Colborn—now a sergeant in the Manitowoc County Sheriff's Office—authored a statement regarding the phone call he had received eight or nine years prior. (ECF No. 323 at 4.) Manitowoc County delivered that statement to the Wisconsin Department of Justice, which reviewed it as part of its investigation into Sheriff Kocourek's and District Attorney Dennis Vogel's handling of the Beerntsen case. (ECF No. 326 at 4-5.) Wisconsin Attorney General Peg Lautenschlager ultimately chose not to charge Kocourek or

Vogel, (*id.* at 5), but that did not stop Avery from filing his own lawsuit against those he deemed responsible for his wrongful incarceration. (*Id.* at 6.) In 2004, he sued both the sheriff and DA, as well as Manitowoc County, for $36 million, alleging they had unconstitutionally withheld exculpatory evidence while he remained in prison. (*Id.*)

While Avery's civil suit was pending, Teresa Halbach, a 25-year-old professional photographer from Calumet County, Wisconsin, disappeared on business in Manitowoc. (*Id.* at 6.) On November 3, 2005, Halbach's family filed a missing person report, which investigators relayed to on-duty officers, including Sergeant Colborn. (*Id.* at 7.) As part of his investigation, Colborn visited Avery's Auto Salvage and spoke with Steven Avery himself. (*Id.*) He also called dispatch to confirm that the license plate SWH-582 corresponded to a 1999 Toyota registered to Halbach. (*Id.* at 8.) That 1999 Toyota proved critical to the investigation; on November 5, 2005, authorities discovered it on the curtilage of Avery's property. (*Id.* at 10.) With Avery now a prime suspect, police obtained a warrant to search his trailer and garage, which Colborn, Manitowoc County Deputy James Lenk, and Calumet County Deputy Dan Kucharski executed between November 5 and 8, 2005. (*Id.* at 12.)

On the final day of the search, in a fit of frustration, Colborn violently shook a bookcase located in Avery's bedroom. (*Id.* at 13.) Moments later, Lenk discovered the key to Halbach's Toyota lying on the floor. (*Id.*) The evidence against Avery then quickly began to mount. Not only did police find his DNA on the key, they also found both his and Halbach's blood inside her vehicle and retrieved her cremains from a burn pit on his property. (*Id.* at 13-14.) Now confident in his case, special prosecutor Ken Kratz officially charged Avery with homicide on November 15, 2005. (*Id.* at 11, 14.) Weeks later, graduate film students Laura Ricciardi and Moira Demos travelled to Manitowoc and commenced work on a project that would eventually become *Making a Murderer*. (*Id.* at 15.)

Avery went to trial on February 12, 2007 in Manitowoc County Circuit Court. (*Id.* at 18.) His defense attorneys, Dean Strang and Jerome Buting, argued, among other things, that the vindictive Manitowoc County Sheriff's Office, still fuming over Avery's prior exoneration, had planted evidence to ensure conviction of a man they had already deemed guilty. (*Id.* at 15, 18.) As part of this defense, Strang cross-examined Colborn, challenged his motives, and tried to paint his conduct as unscrupulous. (*Id.* at 19-20.) Colborn repeatedly denied any wrongdoing. (*Id.* at 19-21.) In closing argument, Kratz explicitly called the frame-up defense a red herring because,

regardless of whether police planted the Toyota key or Avery's blood, the abundance of other evidence sufficed to establish Avery's guilt beyond a reasonable doubt. (*Id.* at 22.) The jury apparently agreed. It returned a guilty verdict on the charges of intentional homicide and felon in possession of a firearm, and Avery was sentenced to life in prison without possibility of parole. (*Id.* at 24.)

Ricciardi and Demos spent the next several years editing footage and mapping out the first few episodes of their project. (*Id.* at 33.) By July 2013, the pair had independently shot 90% of the series and produced rough cuts of the first three episodes. (ECF No. 323 at 37.) One year later, impressed with the work, Netflix licensed *Making a Murderer*. (*Id.*) The company appointed Lisa Nishimura, Adam Del Deo, Ben Cotner, and Marjon Javadi to oversee the project. (ECF No. 318 at 1.) This core team provided feedback and suggestions to help shape the look and feel of the series, though Ricciardi and Demos retained responsibility for editing the cuts. (ECF No. 323 at 41.) And according to the Netflix team, none of them reviewed the raw footage of the trial or depositions. (*Id.* at 40-41.)

The finished product premiered on December 18, 2015 to critical and commercial acclaim. (ECF No. 326 at 35.) In this final cut, Colborn's three-hour trial testimony is reduced to 10 minutes spread across several episodes. (ECF No. 294 at 20.) Dramatic musical flourishes accent particular moments. (ECF No. 285 at 3.) And anachronistic responses are stitched together to give the appearance of a seamless examination. (ECF No. 105 at 44-56.) The episodes also platform Strang and Buting, who, in out-of-court interviews, reiterate their theory that Manitowoc law enforcement officials planted evidence. (ECF No. 287 at 6.) Netflix later released a second season of the program, also produced by Ricciardi and Demos, which focused on Avery's postconviction attorney's attempts to exonerate him. (ECF No. 326 at 43.)

LEGAL STANDARD

"Summary judgment is appropriate where the admissible evidence reveals no genuine issue of any material fact." *Sweatt v. Union Pac. R. Co.*, 796 F.3d 701, 707 (7th Cir. 2015) (citing Fed. R. Civ. P. 56(c)). Material facts are those under the applicable substantive law that "might affect the outcome of the suit." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of "material fact is 'genuine' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id*. If the parties assert different views of the facts, the Court must view

the record in the light most favorable to the nonmoving party. *E.E.O.C. v. Sears, Roebuck & Co.*, 233 F.3d 432, 437 (7th Cir. 2000).

ANALYSIS

Colborn has two claims for relief.[2] (ECF No. 105.) His primary legal theory is defamation. But he also alleges intentional infliction of emotional distress. (*Id.* ¶¶77-81.) Based on the record, neither claim survives summary judgment.

I. Colborn's Defamation Claims Fail as a Matter of Law.

Colborn has only seen about an hour of *Making a Murderer*, ECF No. 271 at 23, but that was enough for him to dub it defamatory. Wisconsin law and the First Amendment require a deeper and more comprehensive analysis. To prove defamation under Wisconsin law, a plaintiff "must show that the defendant (1) published (2) a false, (3) defamatory, and (4) unprivileged statement." *Fin. Fiduciaries, LLC v. Gannett Co., Inc.*, 46 F.4th 654, 665 (7th Cir. 2022) (citing *Torgerson v. J./Sentinel, Inc.*, 563 N.W.2d 472, 477 (1997)). For public officials, like Colborn, the First Amendment also requires "clear and convincing evidence that the defendant published the defamatory statement with actual malice, *i.e.*, with 'knowledge that it was false or with reckless disregard of whether it was false or not.'" *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964)). And the statement at issue must be "of and concerning" the plaintiff. *See Sullivan*, 376 U.S. at 288.

These legal standards wipe out the bulk of Colborn's case. His summary judgment motion adopts an overbroad view of defamation, identifying 52 allegedly defamatory statements. (*See* ECF No. 285 at 6-12.) But most of his gripes read more like media criticism better suited to the op-ed section; they are not actionable statements that could even potentially be defamatory under Wisconsin law. Those few statements that might conceivably be actionable fail for other reasons. Colborn's "defamation by fabricated quotation" claim fares no better because the record shows no instance in which Defendants did not convey the gist of a changed quotation. Colborn's final theory, a claim for "defamation by implication," also fails because he has not produced sufficient evidence to sustain it. Accordingly, the defamation claim cannot proceed to trial.

[2] A third claim for negligence was previously dismissed. (ECF No. 176.)

A. Most of Colborn's 52 Allegedly Defamatory Statements Are Not Actionable, and Those That Are Fail for Other Reasons.

Colborn affirmatively seeks summary judgment in his own favor based on a host of specific aspects of *Making a Murderer*. His kitchen-sink approach identifies 52 instances of alleged defamation. He cites the series' use of music and graphics, its inclusion of certain statements of and concerning other people, its incorporation of true statements or protected opinions, and the alteration of reaction shots from Avery's homicide trial. None of these can support a claim for defamation.

Music and graphics, for example, in isolation, are not "statements" of fact capable of filching from one his good name. *See Terry v. J. Broad. Corp.*, 840 N.W.2d 255, 267-68 (Wis. Ct. App. 2013) (holding that a plaintiff had no case when she challenged only music and video edits but not the words used to portray her). That ousts 13 of Colborn's proposed 52 defamatory statements.[3] While it is true that Netflix's representatives sought "to establish a subtle but impactful theme track for the baddies," (ECF No. 286-9 at 36), no principle of defamation law subjects a publisher to liability based solely on an unnerving musical motif. Moreover, Colborn is not even one of the "baddies" listed in the Netflix notes, so the notes and the corresponding music are also not actionable because they are not "of and concerning" him. (*See id.*)

Colborn makes similar, futile challenges to other statements that are not "of and concerning" him. For example, he objects to Steven Avery's voiceover: "They had the evidence back [in 1985] that I didn't do it. But nobody said anything." (ECF No. 285 at 6.) Though Colborn identifies the voiceover as defamatory, he never explains how it implicates him or why it is false. This is not an anomalous oversight. Colborn also takes issue with Stephen Glynn (Avery's attorney in his $36 million civil case) saying:

> We were just on the absolute edge of getting ready to go after the named defendants in the case with depositions when I get a call from Walt who tells me that he has gotten a call from a journalist asking if either of us would care to comment on the apparent intersection in life between Steven Avery and a woman who has gone missing in the Manitowoc area who we later learn to be Teresa Halbach.

(*Id.* at 9.) On its face, this has nothing to do with Colborn, and he offers no evidence or analysis to the contrary. It therefore cannot be defamatory towards him. The same applies to the words of

[3] See proposed defamatory facts numbers 5, 8, 10, 12, 15, 17, 21, 23, 24, 26, 43, 47, and 52. (ECF No. 287 at 2-4, 7-8.)

a male bar patron: "I only have one word, from the cops on up; it's corruption. Big time. I mean, if people dig far enough, they'll see that." (*Id.* at 10) (cleaned up). If this vague critique of bureaucracy constituted defamation, free speech would be reduced to the freedom to commend those in power. *See Sullivan*, 376 U.S. at 292 (rejecting Alabama's attempt to "transmut[e] criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed."). Yet Colborn relies on 22 allegedly defamatory statements of this ilk.[4] (*See e.g.*, ECF No. 287 at 2, ("They weren't just gonna let Stevie out. They weren't gonna hand that man 36 million dollars."); 5, ("All I can think is they're trying to railroad me again."); 9 ("Them people ain't gonna get away with everything.").)

Other parts of Colborn's case reflect his own dissatisfaction with what is in fact the verifiable truth. It is well-established that "[t]ruth is an absolute defense to a defamation claim." *Anderson v. Hebert*, 798 N.W.2d 275, 280 (Wis. Ct. App. 2011). Thus, in defamation lawsuits at least, verity still prevails, even if the audience lacks the temperament for it. Colborn felt stung by *Making a Murderer*'s inclusion of Glynn's statement:

> [T]here is not only something to this idea that law enforcement had information about somebody else, but there is serious meat on those bones, I mean serious meat. What we learn is that while Steven Avery is sitting in prison, now for a decade, a telephone call comes in to the Manitowoc County Sheriff's Department from another law enforcement agency . . . saying that they had someone in custody who said that he had committed an assault in Manitowoc, and an assault for which somebody was currently in prison.

(ECF No. 287 at 2.) This statement may be unflattering, but the record confirms it is entirely accurate. The same can be said for the docuseries' use of Colborn's deposition testimony from Avery's civil case. (*Id.* at 3.) Altogether, Colborn complains seven times of statements that no one, not even he himself, can prove false.[5] In these instances, it is the facts that aggrieve Colborn, and there is no legal remedy for that. *See Lathan v. J. Co.*, 140 N.W.2d 417, 423 (Wis. 1966)

[4] See proposed defamatory facts numbers 3-4, 7, 11, 20, 22, 25, 27-31, 33-38, 41-42, 49, and 54. (ECF No. 287 at 2-8.)
[5] See proposed defamatory facts numbers 9, 13-14, 18-19, 46, and 53. (ECF No. 287 at 2-4, 7-8.)

("Truth is a complete defense to a libel action.") (citing *Williams v. J. Co.*, 247 N.W. 435 (Wis. 1933)).

Nor can Colborn make a defamation case out of his adversaries' opinions. "Although opinions are not completely exempt from the realm of defamatory communications," *see Terry*, 840 N.W.2d at 266, "if it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable." *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993) (citations omitted). For example, contrary to Colborn's claims, no reasonable viewer could interpret Glynn's explanation of why he thinks Colborn authored a report the day after Avery left prison, *i.e.*, "I think I know [why Colborn authored the report at that time,]" (ECF No. 287 at 3), as anything other than "a subjective view, an interpretation, a theory." Defamation cannot lie for such plainly speculative statements. Colborn relies on another ten, similarly subjective opinions, as part of his defamation case,[6] but these speculations are not actionable as a matter of law.

Equally meritless are Colborn's attempts to turn spliced reaction shots into slander. It is undisputed that the Producers experienced technological snafus that rendered the unedited raw footage of the witness box at Avery's trial unusable. (ECF No. 288 at 10.) As a result, Ricciardi and Demos paid local news outlets for access to their "mixed feed" footage, which cut between counsel, the judge, witnesses, the gallery, and the projection screen. (*Id.* at 10-11.) Because the "mixed feed" did not adopt a steady point of view, it did not always maintain its gaze on witnesses when they stopped speaking. To accommodate for this limitation, the producers occasionally used witness reaction shots from other parts of the trial to fill in the gaps. (*Id.* at 11-12.) Colborn contends that rather than choose the most comparable reaction shots, Ricciardi and Demos used the corrupted footage as an excuse to insert incongruous scenes that made him appear nervous and uncertain. (*See* ECF No. 327 at 57–60.) The problem with this theory is that reaction shots are not falsifiable "statements" capable of defaming their subjects. *See Terry*, 840 N.W.2d at 267 (rejecting a plaintiff's ability to challenge to the way she was portrayed in video edits). In fact, Colborn's papers implicitly acknowledge the vagaries of body language analysis—he has, at different times, described the same shot (leaning back and cracking his knuckles) as making him look apprehensive *and* more confident. (ECF No. 356 at 13.) If the scenes the producers included

[6] See proposed defamatory facts numbers 6, 16, 32, 39-40, 44-45, 48, and 50-51. (ECF No. 287 at 2-3, 6-8.)

are open to such ambiguity, then they are not false in any meaningful sense. And the abstruse, knuckle-cracking interstitial is Colborn's strongest case. His other examples ascribe extensive psychoanalytic intentions to momentary breaks in eye contact. (ECF No. 346-1 at 112-119.) None of this is defamatory.[7]

Colborn is, therefore, not entitled to summary judgment on any of the 52 allegedly defamatory statements he identifies. Conversely, because no reasonable jury could find any of the 52 statements defamatory, Defendants are entitled to summary judgment on any claim based on them.

B. Even Where *Making a Murderer* Alters Colborn's Testimony, it Captures the Gist.

In addition to challenging the 52 previously identified statements, Colborn's complaint includes a "defamation by fabricated quotation" theory. (*See* ECF No. 105 at 44-56.) The idea here is that, in the course of condensing the trial footage, Defendants deliberately altered Colborn's words to make him appear more contemptible. Of course, some alteration is necessary. No documentary is "true" in the strictest sense of the word; they all abbreviate, edit, and emphasize. But there are degrees of falsity, and, for defamation purposes, the question is where to draw the line. After all, "[i]f every [altered quotation] constituted the falsity required to prove actual malice, the practice of journalism, which the First Amendment standard is designed to protect, would require a radical change . . . inconsistent with . . . First Amendment principles." *Masson*, 501 U.S. at 514. Thus, to protect journalists, as well as other voices shouting into the marketplace of ideas, minor inaccuracies are forgiven "so long as 'the substance, the gist, the sting, of the libelous charge be justified.'" *Id.* at 517 (quoting *Heuer v. Kee*, 59 P.2d 1063, 1064 (Cal. Dist. Ct. App. 1936)). "Put another way, [a] statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.'" *Id.* (quoting Robert D. Sack, *Libel, Slander, and Related Problems* 138 (1st ed. 1980)).

Colborn's position is that *Making a Murderer*'s use of "frankenbites" (an industry term for the practice of taking a word from one place and inserting it somewhere else) effected "a material change in the meaning conveyed by [his testimony]." *Masson*, 501 U.S. at 517. It is easy to understand how disparate statements, cobbled together and presented as unbroken speech, might

[7] Though none of the 52 allegedly defamatory facts Colborn incorporates in his motion for summary judgment are individually actionable, they will be considered, in the aggregate, as part of his overall claim for defamation by implication in Part I.C.